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WISCONSIN REPORTS
95

CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

JANUARY 12 — APRIL 30, 1897

PREPARED AND EDITED FOR THE REPORTER

BY JAMES SIMMONS

FREDERIC K. CONOVER

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JUSTICES

OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME.

JOHN B. CASSODAY,
Ex officio CHIEF JUSTICE.
JOHN B. WINSLOW,
SILAS U. PINNEY,
ALFRED W. NEWMAN,
ROUJET D. MARSHALL.

Attorney General, - WILLIAM H. MYLREA.

Clerk, - - - CLARENCE KELLOGG.

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RULE XII, AS AMENDED SEPTEMBER 28, 1897.

Three copies of the printed case shall be served by the plaintiff in error or appellant on the opposite party at least forty days before the day set for the argument of the cause.

RULE XIV, AS AMENDED SEPTEMBER 28, 1897.

The brief of the appellant or plaintiff in error must be served on the opposite party at least fifteen days, and that of the respondent or defendant in error at least five days, before the cause is called for argument. Failure by a party to comply with this rule will entitle the opposite party (if not himself in default) to a continuance for the term, with twenty-five dollars costs; provided, however, the court may, in its discretion, direct that the cause stand for argument in its order. Either party may, without service thereof, submit a supplemental brief on the argument, but the same must be strictly confined to matter in reply to the brief on the other side. (45 Wis. 519; 46 Wis. 703; 50 Wis. and 70 Wis.) No brief will be received or filed after the close of the argument in any case except in cases where permission has been obtained at or before the argument of the case for special cause.

MEMORANDUM.

Owing to the illness of the official reporter this volume (like volumes 29, 69, 79, and a large part of volume 94) has been prepared and conducted through the press by James Simmons, Esquire, of the Walworth county bar.

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CASES DETERMINED

AT THE

January Term, 1897.

OLIVER, Respondent, vs. MORAWETZ, Appellant.

December 15, 1896 — January 12, 1897.

Real-estate brokers: Commissions: Evidence: Collateral fact.

In an action to recover a broker's commission on the sale of real estate, evidence by another broker as to the terms upon which the defendant had told him he might sell the property was inadmissible.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Reversed.*

For the appellant there was a brief by *Timlin & Glicksman*, and oral argument by *W. H. Timlin*.

For the respondent there was a brief by *Smith, Weller & Goff*, and oral argument by *G. D. Goff*. They cited *Platner v. Platner*, 78 N. Y. 90; *Lamprey v. Donacour*, 58 N. H. 376, 377; Wharton, Ev. §§ 20, 21; *Trull v. True*, 33 Me. 367; *Huntsman v. Nichols*, 116 Mass. 521; *State v. Witham*, 72 Me. 537.

CASSODAY, C. J. This action is to recover $1,000, which it is alleged the defendant agreed to pay to the plaintiff as a commission for his services as broker in using his best endeavors to procure and procuring a proper person to purchase the land described, with interest thereon from October

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18, 1892. On the day and year last mentioned the plaintiff did procure one Edwin H. Abbot to purchase of the defendant the land, according to the terms and conditions agreed to by and between the defendant and the plaintiff, to the effect that the property should be sold for $50,000, of which $5,000 was to be cash and the balance secured by mortgage payable within five years, with interest at five per cent. per annum. The plaintiff performed fully all the conditions precedent in the contract on his part. The defendant failed to keep and perform the contract on his part, and failed to pay the plaintiff his commission as agreed. The defendant answered by way of a general denial. At the close of the trial the jury returned a verdict in favor of the plaintiff and assessed his damages at $1,200.50. From the judgment entered thereon the defendant brings this appeal.

It appears that the defendant owned only a one third interest in the property; that all the owners desired to sell it in order to divide the proceeds; that the defendant did not give the plaintiff the exclusive right to sell; that the property was then in the hands of another agent, by the name of Barber, to sell. The testimony is conflicting, and the case close on some questions of fact. Error is assigned because the plaintiff was allowed to prove by the witness Barber that the defendant had told him, in effect, that by reason of their anxiety to sell the property and divide the proceeds they would reduce their former price to $50,000; and that he might sell it at that price for one fourth down and the balance in one, two, and three years at six per cent. interest; and that the usual commission paid to real-estate agents in Milwaukee for the sale of property of that value was two per cent. of the purchase price. Such evidence was inadmissible under the repeated rulings of this court. *Kvammen v. Meridean Mill Co.* 58 Wis. 399; *Nash v. Hoxie*, 59 Wis. 384; *Kelley v. Schupp*, 60 Wis. 76. Evidence of such collateral

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facts, incapable of affording any reasonable presumption or inference as to the facts in issue, simply tended to divert the minds of the jurors from the issue being tried, and hence to mislead them to the prejudice of the defendant. 1 Greenl. Ev. § 52. As stated by another author, and quoted by Mr. Jones in his recent excellent work on the law of evidence, the admission of such testimony is manifestly unjust, "since the conduct of one man under certain circumstances, or toward certain individuals, varying as it will necessarily do according to the motives which influence him, the qualities he possesses, and his knowledge of the character of those with whom he is dealing, can never afford a safe criterion by which to judge of the behavior of another man similarly situated, or of the same man toward other persons." 1 Jones, Ev. § 140, and authorities cited. The furthermost this court has gone in the admission of evidence of collateral facts has been where there is a direct conflict of testimony as to the price orally agreed to be paid for property, to admit evidence of its real value at the time of the contract. *Valley L. Co. v. Smith*, 71 Wis. 304; *Bell v. Radford*, 72 Wis. 402; *Mygatt v. Tarbell*, 85 Wis. 467. Whether, in case of conflict and evenly balanced testimony as to the contract price for services, evidence of the value of the services or cost of performance is admissible has, in one of the cases cited, been left undecided. *Kvammen v. Meridean Mill Co., supra.* In a more recent case, in an action for an alleged balance due for work, evidence of the terms of the defendant's contracts and custom with other workmen was held inadmissible, in the absence of knowledge thereof on the part of the plaintiff. *Brunnell v. Hudson S. M. Co.* 86 Wis. 587, 589.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

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LEISER, Respondent, vs. KIECKHEFER, Appellant.

December 16, 1896—January 12, 1897.

Court and jury: Directing verdict.

The court is not justified in directing a verdict unless, looking at the facts in evidence in the light most favorable to the opposite party, the jury would not be justified in finding a verdict in his favor.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Reversed.*

The plaintiff made his promissory note for $1,500 to the defendant, who sold it to one Schram. The note was not paid at maturity, and, for the purpose of procuring an extension of time, the parties made their joint and several note, for the same sum, to Schram. The plaintiff paid this latter note to Schram, and brings this action to recover from the defendant the sum which he paid to Schram. His claim is that the original note was given by him to the defendant without consideration, and for the defendant's accommodation. The defendant denies this, and asserts that the original note was given by the plaintiff to him as and for the purchase price of his (the defendant's) interest in a certain quarry, which the parties had been operating together as partners. The issue made by the pleading, and which was contested on the trial, was whether the original note was accommodation paper, given without consideration. On that issue each party testified, for himself, directly and positively, to a state of facts directly opposed, as above indicated; and each party was, to some extent, corroborated by evidence of collateral facts, more or less persuasive. A written instrument, purporting to be an absolute assignment by the defendant to the plaintiff of the defendant's interest in the quarry, with a right to repurchase it, at any time within six months, for $1,500 and interest, was put in evidence. The

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plaintiff testified that this instrument was given him as security against his being called upon to pay the note. The defendant testified that it was intended to be what it appeared on its face to be,—an absolute sale of the property. There was, also, the testimony of one witness, to the effect that plaintiff had told the witness that he had bought defendant's interest in the quarry. The court directed a verdict for the plaintiff for the full amount claimed. The appeal is from a judgment entered on that verdict.

For the appellant there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *J. G. Flanders*.

For the respondent the cause was submitted on the brief of *Thos. H. Dorr*.

NEWMAN, J. The only question discussed upon the hearing was whether this was a proper case for the direction of a verdict. The settled rule is that, to justify the direction of a verdict on a question of fact, the evidence must be *clear and uncontradicted, and all one way*. The court must look at the facts in evidence in the most favorable light for the other party in which the jury would be at liberty to find them, and then be able to say that there is no evidence which would justify a verdict in his favor. If there is *some* testimony fairly tending to support the opposite contention, it is a question for the jury. The question — on which side is the preponderance of the evidence — is always for the jury. So that, ordinarily, affirmative testimony, covering the issue, of one witness alone, and he a party and contradicted, is sufficient to take the case to the jury. It is the function of the jury to weigh the testimony. *Lawrence University v. Smith*, 32 Wis. 587; *Spensley v. Lancashire Ins. Co.* 54 Wis. 433; *Jackson v. Jacksonport*, 56 Wis. 310; *Calder v. Crowley*, 74 Wis. 157; *O'Brien v. C. & N. W. R. Co.* 92 Wis. 340. It cannot be said, in this case, that the evidence on the plaint-

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iff's side is uncontradicted, nor that the evidence in the case is all one way, nor that the evidence would not support a verdict for the defendant. The case should have been submitted to the jury.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded for a new trial.

ERDMAN, Respondent, vs. ILLINOIS STEEL COMPANY, Appellant.

December 16, 1896 — January 12, 1897.

Master and servant: Personal injuries: Defective machinery: Continuing in service after promise to repair: Assumption of risk: Objection to continuing work: Evidence: Court and jury.

1. A protest by an employee against continuing in the employment of the master because of some special risk attending it; a promise by the master to remove the danger within a reasonable time; and a continuance of such employment in consideration of such promise,— relieve the employee from the charge of contributory negligence, if injured because of such danger within such time, unless the risk is so obvious and immediate that serious injury may probably result from a continuance of the work.
2. The danger of a saw, four feet in diameter with a crack three inches from the outside, flying to pieces when let down upon large bars or plates of iron while running at a speed of 1,700 revolutions per minute with sufficient force to cut the bars or plates in two, is *held* to have been so obvious, immediate, and constant that an employee engaged in operating it was guilty of negligence in continuing at his work with knowledge of the defect, even in reliance upon the promise of the master to remedy it; and the unsupported testimony of the employee, thirty-five years old and of fourteen years' experience with machinery, that he did not know of the existence of such danger, is insufficient to support a finding of the jury that he neither knew nor ought to have known of it.
3. The testimony of the employee in such case that he asked his vice-principal if he would change the saw; that he did not know that he objected to going to work, or that any one did; that he was

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paid by the ton and would have lost a part of a day's work if he had not commenced at that time; and that he asked if the saw was to be changed because he wanted to change his coat,—is *held* to show that the employee did not object to going to work with the defective saw.

APPEAL from a judgment of the superior court of Milwaukee county: R. N. AUSTIN, Judge. *Reversed.*

The complaint alleges, in substance, that on the 22d day of February, 1894, plaintiff was in the employ of defendant as shear man; that his duties consisted in assisting in the operation of sawing and shearing heated bars and plates of iron by the use of a large circular saw, about four feet in diameter; that the saw was set in a frame, and so adjusted that, when in motion, by pressing on a lever, it could be lowered down upon the iron placed under the saw to be cut; that, before operations commenced on the day in question, the attention of the foreman was called to the fact that the saw was cracked, defective, and unfit for use; that plaintiff and his co-employees protested against working with the defective saw, but, relying on the assurance of the foreman that it was safe, and that he would furnish a new one after they had worked off one heat, they went to work; that soon thereafter, while plaintiff was with due care engaged at his regular duties, by reason of the aforesaid defective condition of the saw, it broke, and the shaft upon which it ran left its bearings, and fragments of the saw and the shaft struck plaintiff upon the body, by reason whereof he was wounded, bruised, his left leg was shattered, and he was otherwise severely injured. The injuries were set forth in detail, and damages claimed to the amount of $50,000. The answer of defendant admitted the allegations of the complaint respecting the employment of plaintiff and the injury, put in issue all other allegations, and alleged contributory negligence on the part of plaintiff. A special verdict was rendered, upon which judgment was entered in plaintiff's favor, and

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defendant appealed, basing such appeal on errors raised by exceptions preserved in the record, which will be noticed in the opinion.

For the appellant there were briefs by *Van Dyke & Van Dyke & Carter*, and oral argument by *W. E. Carter*.

For the respondent there was a brief by *C. J. Faber*, attorney, and *Austin & Fehr*, counsel, and oral argument by *W. H. Austin*.

MARSHALL, J. The jury found specially, among other things, that the saw was defective, to the knowledge of John Blank, who was charged with the duty of seeing that it was kept in proper condition; that John Arndt was the acting foreman; that such foreman, with knowledge of such defect, directed plaintiff and his associates to run one heat, informing them that he would then have the saw changed; that plaintiff went to work relying upon such promise; that defendant was guilty of negligence which proximately contributed to the injury; that plaintiff was not guilty of any such negligence; and that he did not have sufficient knowledge and experience to enable him to know the risk of working with the defective saw prior to his injury. The verdict was challenged as contrary to the evidence, and the ruling of the circuit court in that regard, among others, is before us for review.

That the saw was cracked and defective, to the knowledge of plaintiff, appears clearly from the evidence, and is alleged in the complaint. The proof shows that he was a man of large experience with such machinery, and that he had worked fourteen years in the mill where he was injured, and four years in operating the machine where the accident occurred. His evidence, bearing on his knowledge of the danger, and his justification for working notwithstanding such danger, is substantially as follows: "There were small rollers to carry the iron under the saw. Then the saw was

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pulled down onto the iron. I had to stand alongside of the frame work. The frame was even with the plate. I had to shove the iron under the saw. I was about two feet from the saw when the thing happened. When I came to the mill that morning, Fred Glaesner said to me: 'The saw is cracked. Look at it.' John Arndt, the foreman, was standing there. I said: 'John Arndt, will you change the saw?' He said: 'No; you will have to work one heat with it. It will take till about 10 o'clock.' I relied on that, and went to work. He did not say whether it was dangerous, or not, that I know of. He said it was not dangerous. When they started, I was holding one end of the bar to be cut, Blank was holding the other, and Norton was handling the lever." On cross-examination he said: "I had worked in the mill fourteen years, and four years with the saw. There were four men at work with the saw besides Blank, the foreman. There was no one in the crew that had worked with the saw longer than I had, and only one as long. I looked at the saw after Glaesner said it was cracked. The crack was about two or three inches long. Nobody told me it was dangerous, or not dangerous, or said anything about that. The reason I asked Arndt if he was going to change the saw was, I saw a crack in it. I asked it because I wanted to change my coat, and I knew if he was going to make the change I would have time. I went to work because the foreman said it was not dangerous. I don't know that he had ever worked with the saw. I don't know as I objected to going to work. I don't think I did. I worked by the ton; so, if I had not gone right to work, I would have lost part of a day's wages." John Norton testified, in substance, as follows: Before we started up, *Erdman* told me the saw was cracked. I said to Arndt, "I think we ought to have another saw." He said, "You will have to try and work the heat off." That is all he said. The saw had started, but we had not commenced cutting. *Erdman* showed me the crack.

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It was about three inches long. It was open at the teeth. *Erdman* called my attention to it, and told me to bear down as gently on the lever as I could. I am sure of that. That is just as we were ready to saw the first bar. No one said anything in my hearing about its being dangerous, nothing of the sort. No one, that I know of, made any objection to going to work. John Sanowa testified as follows: "Arndt, the foreman, said the saw should be changed when the heat was out. He said we should work that heat; that is all. I was there till the saw was started, and heard all that was said. Did not hear *Erdman* say anything to Arndt, or Arndt to *Erdman*." Julius Blank testified as follows: "I told Arndt, before we started, that the saw was cracked. He said, when the first heat is out, we will change it. He did not say anything further." There was considerable other evidence on the subject, but nothing to vary the above, on which the jury found, in effect, that plaintiff neither knew nor ought to have known of the risk of working with the defective saw.

A person thirty-five years of age, and of fourteen years' experience with machinery, circumstanced as plaintiff was, must be presumed to know the operation of natural laws, and the dangers which such a defect as the one in question would naturally suggest to a person of ordinary intelligence. *Walsh v. St. P. & D. R. Co.* 27 Minn. 367. Otherwise, the risk that would attend the employment of labor in many manufacturing industries would be so great as to render it impracticable to carry them on. This presumption is too strong to be rebutted, so as to warrant a verdict to the contrary, merely by the evidence of the person whose knowledge is in question that he did not know of the existence of a danger which was obvious to a person of ordinary intelligence, even though not an expert.

But the verdict of the jury is not only wrong, tested by the rule above stated, but the evidence affirmatively shows,

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very clearly, that plaintiff was the most experienced man in the crew; that he knew more about the danger than Arndt; that the talk about changing the saw was, partly at least, the result of a consciousness of such danger; and that, after such conversation was over and the saw was started, plaintiff directed that it should be let down onto the iron with great care, on account of its condition. From all the evidence and circumstances but one inference can reasonably be drawn, and that is that plaintiff knew of the danger as well as Arndt, and did not rely upon the judgment of anybody that it was safe to proceed with the work. The verdict of the jury in this regard is practically without any evidence to support it. There is no evidence but that of plaintiff that Arndt said the saw was not dangerous, and he contradicted himself respecting the matter in such a manner that the finding based on his evidence cannot be sustained. It follows that the plaintiff knew of the defect and of the danger as well as any one did, or could reasonably be expected to know. Therefore, he must be presumed to have assumed the risk, unless the case comes within some exception to the general rule on the subject. *Stephenson v. Duncan*, 73 Wis. 404; *Heath v. Whitebreast C. & M. Co.* 65 Iowa, 737; *Anderson v. H. C. Akeley L. Co.* 47 Minn. 128; *Showalter v. Fairbanks, M. & Co.* 88 Wis. 376; *Peterson v. Sherry L. Co.* 90 Wis. 83; *Hazen v. West Superior L. Co.* 91 Wis. 208; *Gibson v. Erie R. Co.* 63 N. Y. 449; *De Graff v. N. Y. C. & H. R. R. Co.* 76 N. Y. 125; *Hayden v. Smithville Mfg. Co.* 29 Conn. 548; *Olson v. McMullen*, 34 Minn. 94; *Devlin v. W., St. L. & P. R. Co.* 87 Mo. 545.

But it is said plaintiff did not assume the risk because the jury found that he protested against working with the defective saw, and was induced to continue his employment by the promise of Arndt to change it as soon as one heat was worked off. The general doctrine is well established that if an employee continues in the employment of the

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master with knowledge of any special or extraordinary risk attending the same, or under such circumstances that he is chargeable with such knowledge, he cannot recover of the master for any injuries received by reason of such risk. But to such general doctrine there is the exception for which counsel for plaintiff contends; that is, that when an employee notifies the master of a special risk, and objects to continuing the work under the existing conditions, and is induced to continue such work by a promise to remove the danger within a reasonable time, then for such time the employee is not presumed to assume such risk. Such exception has been often recognized by this court. *Stephenson v. Duncan*, 73 Wis. 404; *Sweet v. Ohio C. Co.* 78 Wis. 127; *Corcoran v. Milwaukee G. L. Co.* 81 Wis. 191. Does this case come within the exception? We will discuss that phase of the matter, assuming that there was a promise made to remove the danger, binding on the master, though that is open to serious question. Did plaintiff commence work, on the morning in question, relying on the promise to change the saw when the first heat was run out? He said he did; but that was his conclusion on a question of fact to be found by the jury, and it is entitled to little, if any, weight, under the circumstances. At the threshold of this question there is the essential element of protest or objection to proceed with the work on account of the danger. We fail to find any evidence of such objection or protest. Plaintiff's evidence on that subject is: "I said, 'John Arndt, will you change the saw?'" "I asked John Arndt if he was going to change the saw." "I do not know as I objected to going to work." "I don't know as any one did." "I was paid by the ton." "If I had not gone to work at 6 o'clock, I would have lost part of my wages." "I asked him [Arndt] if he was going to change the saw, because it was pretty cold and I wanted to change coats, and, if he was going to change the saw, then I would have time to go and put on the coat." From

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this it is apparent that plaintiff did not object to working with the defective saw, and did not work with it temporarily in consideration of the promise to change it when the heat was off. He was anxious to commence work on time and put in a full day. It was not very material to the employer whether the work commenced at 6 o'clock or was delayed till 10 o'clock, when the saw could have been changed, because the pay was by the ton, not by the day. The attitude of plaintiff and his associates respecting the matter was merely one of inquiry, whether they were going to be delayed or not, instead of one of objection to or protest against proceeding with the defective saw. So we conclude that the finding, to the effect that plaintiff continued the work in consideration of a promise to remove a danger which he was unwilling to assume the risk of, is without evidence to support it.

But, if the finding of the jury last reviewed could be sustained, the doctrine that an employee can rely upon the master's promise to repair within a reasonable time, to rebut a charge that such employee assumed the risk, is by no means without limitation. If the risk is so obvious and immediate that serious injury may probably result from a continuance of the work, then the doctrine that the employee can proceed, relying upon the promise to repair or to remove the danger, does not apply. *Rothenberger v. N. W. C. M. Co.* 57 Minn. 461. This exception to the exception, if we may call it such, is supported by several good reasons, among which are that it is not consistent with reasonable prudence for one to submit himself voluntarily to imminent danger of probable immediate serious injury, relying upon a mere promise on the part of anybody that such danger will be removed after a time; and further, that, when such danger exists, there is no such thing as a reasonable time to repair, other than presently and before the work proceeds further. To be sure, there are respectable authorities that go so far

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as to hold that a promise by the employer to repair relieves the employee of the consequences of the risk, though the danger be constant, immediate, and serious; but the weight of authority and the doctrine of this court are the other way. *Showalter v. Fairbanks, M. & Co., supra.* The true rule is well stated in the opinion by Mr. Justice ELLIOTT in *Indianapolis & St. L. R. Co. v. Watson*, 114 Ind. 20, as follows: "If the services cannot be continued without constant and immediate danger, and the danger and its character are fully known to the employee, he assumes the risk if he continues the employment." Discussing the subject, Justice ELLIOTT says further, in effect, it is a fundamental principle in this branch of jurisprudence that one who voluntarily incurs a known and immediate danger is guilty of contributory negligence, and we are unable to see why a promise should relieve a party from his own contributory fault. If the danger is not great and constant, then such promise may well be deemed to relieve him; but when it is great and immediate, and of such a nature that a prudent man would not ordinarily incur it, a promise does not nullify or excuse the contributory negligence. To the same effect are *Ford v. Fitchburg R. Co.* 110 Mass. 240; *Hough v. Railway Co.* 100 U. S. 214; *Indianapolis U. R. Co. v. Ott*, 11 Ind. App. 564; *Chicago D. F. & F. Co. v. Van Dam*, 149 Ill. 337; *Rothenberger v. N. W. C. M. Co.* 57 Minn. 461; *Atchison, T. & S. F. R. Co. v. Midgett*, 1 Kan. App. 138.

It follows, from the foregoing, that in order to bring a case within the exception to the general rule, that the employee by continuing in the employment of the master with knowledge of defects in machinery at which he is employed assumes the risk attending such employment, it must be shown, not only that he called the master's attention to such defects and in some way objected to assuming the risk, but that the master expressly or by implication promised the employee to remedy the same within a reasonable time, and

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that the employee continued in the employer's service relying upon such promise. That will rebut the presumption of contributory negligence and assumption of risk on the part of the employee, and create a presumption that, for the reasonable length of time requisite to enable the employer to remove the danger, the former does not assume the risk, and may prudently continue the work. But if the evidence shows that the danger is immediate, constant, and great, so that a reasonably prudent person ought not to subject himself to it, then the latter presumption is overcome, and the employee has no right of action, in case of an injury because of such danger, on account of his contributory negligence.

It follows, from the foregoing, that if the finding of the jury respecting the agreement to change the saw, and the continuance of the work by plaintiff relying thereon, could be sustained, if the danger was obvious, immediate, constant, and the probable consequences the infliction of serious bodily injury upon plaintiff, it was negligence upon his part to rely upon such agreement. That such was the situation is too plain to admit of serious discussion. It does not require an expert, even, to understand that a saw four feet in diameter, running at a speed of 1,700 revolutions a minute, cracked three inches from the outside, when let down upon a large iron plate or bar and operated with sufficient force to cut it in two, is in danger of flying to pieces and seriously injuring all who may be in the vicinity. That a person of plaintiff's experience with such a machine did not know of such danger is beyond comprehension. It was negligent to the point of recklessness to work with such a defective saw at all, under the circumstances. That brings the case clearly within the exception to the rule that a protest by the employee to continuing in the employment of the master because of the existence of some special risk attending it, a promise by the employer to remove the danger within a reasonable time, and a continuance of such employment in con-

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sideration of such promise, relieves such employee from the charge of contributory negligence, if injured because of such danger within such time. It follows that the finding of the jury in respect to plaintiff's contributory negligence is without any evidence to support it on any theory of the case.

There are several errors assigned, not referred to, but the conclusion to which we have arrived renders it unnecessary to consider them.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded for a new trial.

WALISH, Appellant, vs. THE CITY OF MILWAUKEE, Respondent.

December 16, 1896 — January 12, 1897.

Municipal corporations: Milwaukee city charter: Damages for change of grade: Condition precedent: Viaduct on street.

1. Under the charter of Milwaukee (Laws of 1874, ch. 184, subch. VII, sec. 8) giving the owner of land affected by the change of the grade of any street a right to compensation therefor, where such change was made after a permanent grade had been established and "after such street shall have been actually graded to such established grade," the actual grading of the street to the grade first established is a condition precedent to the right to recover damages occasioned by the change.
2. Where the change of grade in a street by reason of the construction of a viaduct therein is made under authority of law and with due care, the municipality is not liable for *consequential* injuries to abutting property, unless made so by statute or the constitution. *Colclough v. Milwaukee*, 92 Wis. 182, followed.

APPEAL from an order of the superior court of Milwaukee county: R. N. AUSTIN, Judge. *Affirmed.*

For the appellant there was a brief by *Lenicheck & Lenicheck*, and oral argument by *F. J. Lenicheck*. They con-

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tended, *inter alia*, that the grievance complained of is an unlawful invasion of plaintiff's right of property — a taking of his property without compensation within the meaning of the state and federal constitutions. The viaduct in question is a permanent structure above the street, and an invasion upon the appurtenant easement held by the abutting owner. Such structure is not in conformity to the *ordinary use of the highway*, and is subversive of the owner's easement and beneficial estate. The owner has an absolute right to the use of the street in front of him for ordinary street purposes. The interest of the abutting owner, his right to light and air and ventilation and freedom of access, his frontage, his exemption from annoyances, is property, and can only be taken from him by legal process and for just compensation. The owner is entitled to enjoy his property free from annoyances resulting from smells, dust, noise, etc. All such rights are property, and an unlawful invasion thereof entitles the owner to damages. Depriving him of the beneficial use and enjoyment of his property is a taking of private property for public use. Elliott, Roads & S. 155; Lewis, Eminent Dom. §§ 54–56, 59, 100, 122, 123; Dillon, Mun. Corp. (4th ed.), § 587*b*; Beach, Pub. Corp. §§ 657, 658; Cooley, Const. Lim. (6th ed.), 670; Tiedeman, Lim. of Police Power, 397; Randolph, Eminent Dom. §§ 147, 148, 152, 404; *Arimond v. G. B. & M. C. Co.* 31 Wis. 316; *Buchner v. C., M. & N. W. R. Co.* 56 id. 403; *Sherman v. M., L. S. & W. R. Co.* 40 id. 645; *Pumpelly v. Green Bay & M. C. Co.* 13 Wall. 166; *Rigney v. Chicago*, 102 Ill. 64; *Yates v. Milwaukee*, 10 Wall. 497; *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308; *Eaton v. B. C. & M. R. R.* 51 N. H. 504; *Thompson v. Androscoggin River Imp. Co.* 54 id. 545; *Vanderlip v. Grand Rapids*, 73 Mich. 522, 16 Am. St. Rep. 597, and note; *Story v. N. Y. El. R. Co.* 90 N. Y. 122; *Lahr v. Metropolitan El. R. Co.* 104 id. 268. The building of a viaduct is a new and additional use of the

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street, and imposes an additional burden or servitude on the fee. Randolph, Eminent Dom. § 162. The soil cannot be devoted to a different use, whether more or less onerous, without compensation to the abutting owner. Lewis, Eminent Dom. § 140; Beach, Pub. Corp. § 663; *Shawneetown v. Mason*, 82 Ill. 337; Cooley, Const. Lim. (6th ed.), 674, 675.

For the respondent there was a brief by *Charles H. Hamilton*, city attorney, and *Howard Van Wyck*, assistant city attorney, and oral argument by *Mr. Van Wyck*.

CASSODAY, C. J. This is an appeal from an order sustaining a demurrer to the plaintiff's complaint, alleging, in effect: That the plaintiff has been the owner of the lot described ever since 1876. That the lot is on the corner of North Water and Pearson streets, and lies on the north side of Pearson street and on the west side of North Water street, and is fifty feet front on North Water street, and extends west about 270 feet on Pearson street, to the established dock line on the Milwaukee river. That the lot is bounded on the west by the river. That, since 1876, the plaintiff has resided thereon with his family as a homestead. That February 13, 1888, the defendant, by ordinance, permanently established the grade of North Water and Pearson streets in front of the premises of the plaintiff, and fixed and permanently established the same as follows: At the point of intersection of Van Buren street, thirty six and one-half feet, assuming as a base the Milwaukee river as it was in March, 1836. That Van Buren, Pearson, and North Water streets join together in front of the plaintiff's premises. That, August 8, 1892, the defendant, by ordinance, duly ordained that the city, in pursuance to ch. 411, Laws of 1891, issue bonds for the construction of a viaduct across the river from the intersection of Van Buren street with Brady street to the intersection of Holton street with Reservoir avenue. That March 20, 1893, the defendant, by ordinance, ordained

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that the grade of elevation of the viaduct in front of the plaintiff's premises should be permanently fixed and established, so as to be eighteen feet higher than the grade established by the ordinance of February 13, 1888. That the defendant erected the viaduct in conformity to the grade last mentioned, and the same is now completed in accordance therewith and in accordance with the specifications and plans in possession of the defendant. That the viaduct is built of iron, and commences at Brady and Van Buren streets, and passes through Van Buren street into North Water and Pearson streets, and thence, through Pearson street, west and across the Milwaukee river. That the same is supported by heavy columns, set into the street below and above the surface, and also set into the river. That the columns and viaduct are carried a great distance above the plaintiff's lot, and immediately south of his premises. That Pearson and North Water streets are public highways, used as such for forty years. That the river is navigable. That the erection and maintenance of the viaduct has caused a great and material injury to the premises of the plaintiff, in the several particulars mentioned therein. That the defendant has unlawfully appropriated and taken the streets and river abutting the plaintiff's lot, of which he is the owner in fee, for the construction, use, and maintenance of the viaduct. That the defendant has refused to allow the plaintiff any damages for his said injuries. Wherefore he demands judgment for $25,000 damages, and costs.

It is nowhere alleged, nor is it claimed, that at any time prior to the re-establishment of the grade, March 20, 1893, as stated, that Pearson and North Water streets, or either of them, were, or was, ever actually graded to the grade so established February 13, 1888, nor that, at the time of so changing the grade or the erection of the viaduct, the board of public works did not make an assessment of benefits and damages as required by the provisions of the charter. More-

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over, there is no allegation that either of such grades was so established or changed or re-established unlawfully. On the contrary, it is to be fairly inferred from the complaint that each and all of such grades were duly and regularly established, and changed or re-established, in strict accordance with the requirements of the charter, and that the viaduct was erected and constructed in conformity therewith. The charter provides that, "in all cases in which the grade of any street has been permanently established by ordinance since February 20, 1852, or shall hereafter be so established, and after such permanent establishment thereof, and *after such street shall have been actually graded to such established grade*, the grade so established has been or shall be altered by the city, the owner of any lot or parcel of land which may be affected or injured in consequence of such alteration of grade shall be entitled to compensation therefor." Sec. 8, subch. VII, ch. 184, Laws of 1874. Since the street was never actually graded to the grade so established in 1888, but was actually worked and completed only to the grade so established March 20, 1893, it follows that the complaint fails to state a cause of action for compensation for a change of grade, so given by the provision of the charter quoted. This is apparent from numerous decisions of this court, among which are the following: *Stadler v. Milwaukee*, 34 Wis. 98; *French v. Milwaukee*, 49 Wis. 584; *Tyson v. Milwaukee*, 50 Wis. 78. The right to damages in such a case is purely statutory. *Id.* Hence, the well-established rule that, where a change of grade in a street is made under authority of law and with due care, the municipality is not liable for *consequential* injury to abutting lots, unless made so by statute or the constitution. *Drummond v. Eau Claire*, 85 Wis. 562, and cases there cited. This rule was applied in *Colclough v. Milwaukee*, 92 Wis. 182. In that case it was held that: "(1) The construction of an elevated approach to a viaduct, occupying the entire width of the street, is merely a change

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of the grade of the street, and is not a new taking of, nor does it impose any additional use or servitude upon, the property of the abutting owner. In the absence of any express statute allowing it, therefore, no damages can be awarded to said owner for injury to his property caused by the construction of such approach; nor will its construction be restrained at his suit. (2) Such a lawful change of the grade of a street is not a closing up or use or obstruction of the street, within the meaning of ch. 255, Laws of 1889 (S. & B. Ann. Stats. sec. 1296*a*)." We are clearly of the opinion that the case at bar is not distinguishable in principle from that case; and, hence, what Mr. Justice PINNEY there said must be regarded as the opinion of the court in this case.

By the Court.— The order of the superior court of Milwaukee county is affirmed.

ZAUTCKE, Respondent, vs. NORTH MILWAUKEE TOWNSITE COMPANY No. 3, Appellant.

December 17, 1896 — January 12, 1897.

Negotiable instruments: When interest becomes due: Demand: Default.

The fact that a note bearing interest payable semiannually was dated, executed, and delivered on a certain day fixes the date for the payment of instalments of interest at the end of every six months thereafter, and no demand was necessary to create a default.

APPEAL from an order of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Affirmed.*

This is an action to foreclose a mortgage upon real estate. The complaint alleges that the mortgage was given to secure payment of a promissory note executed, delivered, and bear-

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ing date on the 26th of June, 1893, whereby the defendant promised to pay to the plaintiff's order the sum of $53,000 on or before five years from date thereof, with interest thereon at the rate of six per cent. per annum, *payable semi-annually.* The complaint further alleges default in the payment of the semiannual instalment of interest which fell due June 26, 1895; also that the plaintiff thereafter duly exercised an option contained in the mortgage by which he was empowered to declare the entire sum due. The complaint also contains the other usual and appropriate allegations in foreclosure actions, which, however, are not necessary to be stated. A general demurrer to the complaint was overruled, and the defendant appealed.

For the appellant there was a brief by *Timlin & Glicksman*, and oral argument by *W. H. Timlin.*

For the respondent there was a brief by *Wells, Brigham & Upham*, and oral argument by *W. E. Black.*

WINSLOW, J. The defect supposed to exist in this complaint is that the semiannual instalments of interest do not, by the terms of the note, become due on a day certain, and that a demand was necessary before a default took place. The point is manifestly not well taken. The note was *dated*, executed, and delivered on the 26th of June, and by its terms interest is payable semiannually. This fixes the date of payment at the end of every six months thereafter. An instalment of interest therefore was due June 26, 1895, and no demand was necessary to create a default.

By the Court.— Order affirmed.

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WICKHAM, Administrator, Appellant, vs. THE CHICAGO & NORTHWESTERN RAILWAY COMPANY, Respondent.

December 18, 1896 — January 12, 1897.

Railroads: Killing of child on track: Signals: Negative testimony: Unlawful speed: Lookout: Fencing right of way: Proximate cause: Court and jury: Evidence.

1. Where four witnesses have testified positively to the giving of customary signals by a locomotive, the testimony of two witnesses who were where they could have heard the signals, that they heard none but gave the matter no attention, was insufficient to require the submission to the jury of the question whether signals were given.
2. In an action against a railroad company for the killing of a boy nine years old who had attempted to cross defendant's tracks at a point much used by pedestrians, it appeared that there were three tracks at the place of the accident with a space of about nine feet between them; that the boy was seen standing between the rails of the easterly track waiting for the passing of a freight train going south on the middle track; that immediately after the caboose had passed he started to run west across the other tracks and was struck and killed by the engine of a passenger train going north on the west track at a speed of about ten miles per hour. The engineer testified that he was keeping lookout ahead of his train but did not see the boy. *Held*, that the failure to see the boy was not inconsistent with the fact of a proper lookout.
3. The rate of speed of trains in a city being limited by ch. 467, Laws of 1891, to fifteen miles per hour, a less rate of speed cannot become unlawful unless by reason of some peculiar danger of the situation.
4. The primary purpose of fencing the right of way of a railroad, as required by sec. 1810, R. S., is to prevent animals, not persons, from coming upon the track; but if it were otherwise, the company would not be liable, by reason of the failure to fence, for the killing of a person by a passing locomotive, unless it appeared affirmatively that such person came upon the right of way at a point where it was not fenced.

[5. Whether it is the duty of a railroad company to fence its right of way within the limits of a city, where danger from domestic animals upon the track would be comparatively small and the fencing of the road might inconvenience public traffic, not determined.]

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APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Affirmed.*

This is an action to recover for the death of the plaintiff's decedent, James M. Spencer, a boy between nine and ten years old. He was struck and instantly killed by the defendant's passenger train. It was within the city of Milwaukee, and near the defendant's passenger station of Bay View. It was also near the point where the defendant's tracks cross Potter avenue. The tracks are here unfenced. The public had been accustomed to use the defendant's roadbed for passing and repassing between Potter avenue and the first street to the north, and the Bay View station, a distance of about 800 feet. There were three tracks at this place, about nine feet apart, with the space between smooth and convenient to pedestrians. At the time of the accident, a freight train of thirty cars and a caboose was passing to the south across Potter avenue. The crossing gates were down. The deceased was seen, at that time, standing between the rails of the most easterly track, and about forty feet north of Potter avenue. As soon as the caboose had passed, he was seen to start and run in a direction to cross the tracks. On the westerly track he was struck and killed by the engine of a passenger train coming from the south. After the evidence on both sides was all in, the court directed a verdict for the defendant. From a judgment on that verdict the plaintiff appeals.

For the appellant there was a brief signed by *Elliott, Hickox & Groth*, and oral argument by *E. S. Elliott* and *C. T. Hickox.*

For the respondent there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *F. C. Winkler.*

NEWMAN, J. It is urged for the appellant that the evidence produced on his behalf was sufficient to require the

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submission of the case to the jury. It is claimed that the evidence sufficiently establishes the negligence of the defendant in four several particulars: (1) It failed to give the customary signals of the approach of its passenger train; (2) the employees on the train failed to keep a proper lookout; (3) the train was run at an unusual and dangerous rate of speed; and (4) the road was unfenced. It must be conceded that, if there was evidence sufficient to support a verdict for the plaintiff on either of such grounds of negligence, the case should not have been taken from the jury. The settled rule is that a verdict for the defendant should not be directed unless the evidence is practically undisputed and all one way, so that, by giving it the construction most favorable to the plaintiff which it will reasonably bear, including all reasonable inferences from it, it is insufficient to support a verdict in favor of the plaintiff. *Jackson v. Jacksonport*, 56 Wis. 310; *Radmann v. C., M. & St. P. R. Co.* 78 Wis. 22; *Kruse v. C., M. & St. P. R. Co.* 82 Wis. 568.

1. Did the train give the customary signals of its approach? Four witnesses testified affirmatively that the usual signals were given, both by sounding the whistle and ringing the bell. They testify that they heard the signals. On the other hand, two witnesses testify that they heard no signals. They were where they could have heard, but gave the matter no attention. Would this testimony support a verdict for the plaintiff on this question? Apparently, the witnesses are of equal credibility, and had equal opportunity of hearing. In such case the rule applies: "The positive testimony of one credible witness to a fact is entitled to more weight than that of several others who testify negatively, or, at most, to collateral circumstances merely persuasive in their character." 3 Greenl. Ev. § 375; *Ralph v. C. & N. W. R. Co.* 32 Wis. 177; *Pennoyer v. Allen*, 56 Wis. 502; *Draper v. Baker*, 61 Wis. 450; *Hinton v. Cream City R. Co.* 65 Wis. 323; *Joannes v. Millerd*, 90 Wis. 68. Where

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the evidence to prove a fact is direct and positive and satisfactory and the evidence to disprove it is purely negative, the positive proof must prevail. *Cook v. Racine*, 49 Wis. 243. The evidence that the signals were given was practically undisputed.

2. Did the employees on the train fail to keep a proper lookout for persons on the track? The engineer of the train testifies that he was keeping a lookout ahead of his train, but that he did not see the boy. His failure to see the boy may, perhaps, be explained, consistent with the fact of a proper lookout, by this consideration: that the boy was concealed from his view by the passing freight train until his engine was upon Potter avenue crossing, and only a few feet from the boy, who, from his nearness to the engine, was not then fairly within the field of his vision. The best possible lookout could not have enabled him to discover the boy in time to have stopped his train, or to have materially slackened its speed before it struck him.

3. Was the train running at an unlawful rate of speed? It was estimated by the engineer that it was running at a speed of about ten miles an hour. The rate of speed of trains in cities and villages is limited by law to fifteen miles an hour. Laws of 1891, ch. 467. No doubt a less rate of speed may become unlawful by reason of some peculiar danger of the situation. No such situation is disclosed by the evidence.

4. Did the absence of a fence cause the accident? Of course, the absence of a fence could not be the active, producing cause of the accident. It was merely a condition which possibly rendered the accident more likely to happen. In that sense it might be the cause of the accident. Ordinarily a condition is a remote cause. The absence of a fence might be the proximate cause, in the sense of the law, of an injury to domestic animals, such as are usually restrained by fences. The purpose of the railroad fence, as expressed

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in the statute itself, is "to prevent cattle and other domestic animals from going on such railroad." R. S. sec. 1810. Its purpose is not, at least primarily, to prevent persons from going upon the railroad. A fence is a clumsy contrivance for the exclusion of persons. Especially for the exclusion of boys of the age of the plaintiff's decedent, the common railroad fence is ineffective and delusive. Boys climb fences with such ready facility. To exclude them the fence must be both tight and high. While the common fence might serve some useful purpose as a warning, it must be inadequate for the purpose of exclusion. It would seem that, for the purpose of a warning to the deceased, the lowered gates and the passing freight train should have been ample. But if it shall be held that to exclude persons from going upon the track is a purpose of the railroad fence, and that the deceased lacked the discretion which should make him responsible for ordinary care, it would seem that the same rules should be applied as in the case of domestic animals. It must then, at least, appear with reasonable certainty that a fence would have prevented the accident; else the want of a fence cannot be the cause of the accident. So, it is held in the case of domestic animals, that in order to show that the absence of a fence was the cause of the injury it must be made to appear that the animal came upon the track at a point where the company was bound to maintain a fence; and that, if the animal came upon the track from adjoining depot grounds, the company is not liable. *Bennett v. C. & N. W. R. Co.* 19 Wis. 145; *Bremmer v. G. B., S. P. & N. R. Co.* 61 Wis. 114. This case is entirely without evidence to show where the boy came upon the track. He first appears upon the track. Whether he came from the adjoining depot grounds of Bay View station, or from Potter avenue crossing, is uncertain. So, on this theory of the purpose of the railroad fence, the evidence fails to show that the absence of the fence was the cause of the death of the plaint-

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iff's decedent. It is not determined whether the defendant was required to fence its road at the place of the accident. It was very near to — perhaps included in — reasonable depot grounds. It was within the limits of a city, where danger from domestic animals upon the track would be comparatively small, and the fencing of the road might be inconvenient to the public traffic.

There were several errors alleged on the exclusion of evidence, but none of them seem to be of sufficient importance to require treatment at length, in the view which has been taken of the case.

By the Court.— The judgment of the circuit court is affirmed.

MILBAUER and others, Respondents, vs. SCHOTTEN and others, Appellants.

December 18, 1896 — January 12, 1897.

Appealable order: Election between express contract and quantum meruit.

An order denying a motion to require plaintiff to elect whether he will proceed upon a cause of action on express contract or upon one on *quantum meruit* is not appealable under ch. 212, Laws of 1895.

APPEAL from an order of the superior court of Milwaukee county: R. N. AUSTIN, Judge. *Appeal dismissed.*

The facts are sufficiently stated in the opinion of the court.

The cause was submitted for the appellants on the brief of *Henry L. Buxton*, and for the respondents on that of *Toohey, Gilmore & Donovan.*

MARSHALL, J. The defendants, conceiving that the complaint contains a cause of action for a recovery on an ex-

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press contract and also upon *quantum meruit*, moved the court for an order requiring plaintiffs to elect upon which cause of action they would rely. The motion was denied, and defendants appealed from the order entered in accordance therewith.

Appeals from orders are regulated by ch. 212, Laws of 1895, and, respecting orders entered in actions before judgment, it provides that only the following may be so carried to the supreme court for review: An order affecting a substantial right, made in an action where such order, in effect, determines the action, and prevents a judgment from which an appeal might be taken; an order which refuses, continues, or modifies a provisional remedy, or grants, refuses, modifies, or dissolves an injunction, or sets aside or dismisses a writ of attachment for irregularity, or when it sustains or overrules a demurrer. This appeal is not from such an order; hence must be dismissed.

By the Court.— The appeal is dismissed.

WRIGHT and others, Respondents, vs. THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Appellant.

December 18, 1896 — January 12, 1897.

Street railways: Transfer of franchise to operate road: Easement: Imposed duties: Voluntary surrender: Nonuser.

1. A franchise to operate a street railway is inalienable at common law, but authority to sell and transfer it may be conferred by statute. In this state such authority is given by subd. 7, sec. 1748, R. S., and by ch. 221, Laws of 1883, as amended by ch. 127, Laws of 1891.
2. A franchise to operate a street railway is not merely an easement to use the street for the time, in the manner, and under the conditions specified in the grant, and, when accepted and acted upon by the grantee, a contract between it and the public, but it is also a grant from the state, by the acceptance of which the grantee

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becomes charged with the duty of serving the public, from which it cannot emancipate itself by merely ceasing to operate its cars.

8. A street railway was not operated on two blocks during four years and eight months, a period of great industrial depression, and of extraordinary financial difficulties on the part of its successive owners. During that time, the track had been taken up with the knowledge and acquiescence of the owner and the street paved, but the means of locomotion had also been changed, rendering the old track practically worthless and an entire reconstruction necessary. An ordinance declaring the franchises over such blocks forfeited was introduced, but upon the representation of the then owner that it was its intention to operate the road over such blocks in the near future, was not adopted. Any intention to abandon its rights in the street was expressly denied by the officials of the road. *Held*, that the nonuser of the franchises had not existed for such a length of time or under such circumstances that surrender of the franchises and its acceptance by the state could be presumed. *Combes v. Keyes*, 89 Wis. 297, distinguished and limited.

APPEAL from an order of the superior court of Milwaukee county: R. N. AUSTIN, Judge. *Reversed.*

This is an action in equity brought by three property owners, owning lots abutting upon Twenty-Seventh street, otherwise called Washington avenue, in the city of Milwaukee, to obtain a permanent injunction against the *Milwaukee Electric Railway & Light Company*, enjoining it from laying street-railway tracks through said street in front of the plaintiffs' property. A temporary injunctional order was made *pendente lite*, and the defendant appealed. The facts appearing upon the complaint and the affidavits filed upon both sides on the hearing of the motion for an injunction were not materially in dispute, and are substantially as follows: On the 1st of June, 1874, an ordinance was passed by the common council of the city of Milwaukee granting to John H. Tesch and others and their successors and assigns the right to lay street-railway tracks upon certain streets in the city of Milwaukee, named in the ordinance, and to maintain and operate a horse railway thereon until the 1st day of July, 1924. The street in question in

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this suit was not included within the ordinance. The ordinance provided that the grantees and their assigns should complete and operate two miles of railway within two years from the 1st day of July, 1874, and the entire balance of the lines within ten years from that date, "and, upon the failure to complete and operate the said railway as above provided, then all rights hereby granted and vested shall cease and determine." The ordinance contained further conditions and requirements as to the cars and tracks, and the use thereof, and the rate of the fare, but did not contain any further provisions as to forfeiture of the rights granted, by nonuser.

Under this ordinance, a street railway was constructed upon all the streets named in the same, and within the time required by the conditions of the ordinance. In August, 1886, said railway had passed into the hands of the West Side Street Railway Company, by purchase and assignment; one of its lines running from the central portion of the city west on Grand avenue and Wells street, and crossing Twenty-Seventh street near the west city limits. At this time it was proposed to hold the State Fair upon certain grounds in the city of Milwaukee, and about four blocks north of Wells street; and it was made a condition upon which the holding of the fair in Milwaukee depended that a street-railway line should be completed by the West Side Street Railway Company to the proposed fair grounds. It appears further that the railway company consented to construct said line from Wells street north, on Twenty-Seventh street, for a distance of four blocks, provided the city would grant them a franchise therefor. Thereupon an ordinance was passed by the city council August 2, 1886, granting to the railway company, its successors and assigns, the right to lay such railway track along said Washington avenue or Twenty-Seventh street, commencing at Wells street and running thence northerly four blocks to Chestnut street;

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such ordinance being granted under and subject to the same conditions as were provided in the previous ordinance herein named. In accordance with this ordinance, in September, 1886, a double horse-railway track was laid in said street, and the same was operated in September, 1886, during the holding of the State Fair. From this time, until and including the fall of 1891, the railway was operated upon said street during the holding of the State Fair in each year, and at other irregular intervals when circuses were held upon the fair grounds, but in the intervals the road along these four blocks was not operated.

In the year 1889 an ordinance was passed by the city council authorizing the use of electricity as a motive power upon the street railways operating in Milwaukee, and in 1890 the lines of the railway company, including the line upon the four blocks in question, were equipped with trolley poles and wires, and thereafter operated by electricity.

In September, 1891, the lines and franchises of the West Side Street Railway Company had come by purchase and assignment into the ownership of the West Side Street Railroad Company, and a contract was made in that month for the sale of all the stock of the said last-named company to the North American Company, in the interest of a new corporation, called the Milwaukee Street Railway Company; the contract being made to the North American Company pending payment of the purchase price. It was apparently expected at the time of the making of this contract that the possession of the North American Company was to be temporary only, but, by reason of financial difficulties, no conveyance was made to the Milwaukee Street Railway Company until January, 1894. In the meantime it was ascertained that the ordinary horse-railway track was too lightly constructed for the purposes of an electric railroad, and that, before any continuous operation by electricity, new and heavier rails must be laid.

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In the summer of 1892 the city of Milwaukee caused to be paved with cedar blocks the two blocks in question, at the expense of the adjoining property owners, and the rails of the street-railway company were taken up; but the electric poles and wires, except the trolley wire, were left in place. These two blocks remained in this condition until May 24, 1896, and they are the two blocks in question in this action. The remaining two blocks covered by the franchise were not paved, and they have been operated continuously at all times. The Milwaukee Street Railway Company acquired, by conveyance, all of the street-railway property in Milwaukee, including this franchise, in January, 1894; and mortgaged its property and franchises at the same time to the Central Trust Company of New York. Foreclosure of this mortgage was commenced May 24, 1895. In the fall of 1895 the remaining two blocks of Twenty-Seventh street covered by the franchise were paved with cedar blocks, and at the same time the railway thereon was reconstructed with an appropriate electric roadbed and rails. December 2 of the same year, an ordinance was introduced in the common council repealing certain street-railway franchises, and including the franchise for the two blocks in question here, and the same was referred to the railway committee. In January, 1896, a sale was made under a final decree in foreclosure, which had been previously entered, by which all the street-railway properties of the Milwaukee Street Railway Company were sold and conveyed to the *Milwaukee Electric Railway & Light Company*, the defendant in this action. In the winter of 1896 the president of the new company appeared before the railway committee of the common council, and objected to the forfeiture of the franchise upon the two blocks in question, on the ground that the company intended to reconstruct and operate the same in the following spring. Thereupon the clause of the ordinance forfeiting the franchise for the

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two blocks in question was stricken out, and the ordinance was then passed. Soon after midnight on the 24th day of May, 1896, being Sunday, the defendant commenced to reconstruct its track on Twenty-Seventh street, between Wells and State streets, with a force of about 200 men; and about noon of the same day, after the work had progressed to a considerable extent, and the street had been largely torn up and part of the tracks laid, this action was commenced for a permanent injunction, on the ground that the franchise had been forfeited and abandoned; and a temporary restraining order was granted until the hearing of the motion for the injunctional order *pendente lite*. Upon the hearing of said motion, the order in question, from which this appeal is taken, was granted.

For the appellant there was a brief by *Miller, Noyes, Miller & Wahl*, and oral argument by *Geo. P. Miller*. They argued, among other things, that the right of the defendant to the use of a street for its railway is a franchise granted on behalf of the state by the city authorities, and its acceptance constituted not a mere contract with the city, but an assumption of a duty to build and operate the road; of which duty the defendant could not relieve itself by abandonment or nonuser. *State ex rel. Cream City R. Co. v. Hilbert*, 72 Wis. 190; *Chicago Gen. R. Co. v. Chicago City R. Co.* 62 Ill. App. 522; *People v. A. & V. R. Co.* 24 N. Y. 261, and cases cited by the court. Only the state could change or waive the condition of the contract. Here no intention on the part of the defendant to abandon its rights was shown, but the contrary. Nonuser might be a ground of forfeiture, but does not operate *ipso facto*. *Strong v. McCagg*, 55 Wis. 629; *Sleeper v. Goodwin*, 67 id. 585; *Ashland v. Wheeler*, 88 id. 617.

W. J. Turner, for the respondents, contended that equity might give relief against the unlawful use of a street, in a suit by abutting owners. *Pettibone v. Hamilton*, 40 Wis.

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402, 415; *Taylor v. Bay City St. R. Co.* 80 Mich. 77; *Fanning v. Osborne*, 102 N. Y. 441; Booth, Street Railway Law, § 100. The rights of defendant have been lost by abandonment. *Henderson v. Cent. Pass. R. Co.* 21 Fed. Rep. 358.

WINSLOW, J. The question presented is whether the right and duty to operate a street railway over the two blocks in front of the plaintiffs' lots had been extinguished at the time of the commencement of this action. The power to grant the right in question was conferred upon the city by the provisions of sec. 1862, R. S. 1878, as amended by ch. 219, Laws of 1881. At common law such a franchise or right was undoubtedly inalienable. *State ex rel. Milwaukee St. R. Co. v. Anderson*, 90 Wis. 550. A sale and transfer thereof may, however, be authorized by statute. *Chapman Valve Mfg. Co. v. Oconto W. Co.* 89 Wis. 264. Such authority has been granted by the statutes of this state. Laws of 1883, ch. 221, as amended by Laws of 1891, ch. 127. The statute also authorizes a corporation to mortgage its franchises. R. S. 1878, sec. 1748, subd. 7. So, it would seem that there can be no question but that the various conveyances and assignments by which the franchise in question has finally come into the ownership of the present defendant are valid and operative. Such being the case, it will be necessary to consider the legal nature of the right to lay tracks and operate a street railroad in a public street.

Such a right necessarily includes an easement to use the street for the time, in the manner, and under the conditions specified in the ordinance. The ordinance, when accepted and acted upon by the grantee, becomes also a contract between the public, acting through the city council, on the one hand, and the railway company, on the other; the consideration for the partial surrender of the street being the advantages to the public arising from inexpensive and rapid transit, and the assumption by the company of the duty of

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continuing to furnish such transit during the life of the ordinance. But the right under consideration is something more than an easement, and more than a mere contract right. It is also a franchise granted by the state, acting through the common council of the city, to the railroad company. It becomes, when owned by a corporation, one of its corporate franchises, for failure to exercise which an action may be brought by the attorney general, in the name of the state, to vacate its charter, under sec. 3241, R. S. 1878. This was held in the case of *State ex rel. Att'y Gen. v. Madison St. R. Co.* 72 Wis. 612, and has been affirmed in principle in numerous later decisions. *Ashland v. Wheeler*, 88 Wis. 607; *State ex rel. Milwaukee St. R. Co. v. Anderson*, 90 Wis. 550; *State ex rel. Att'y Gen. v. Janesville W. Co.* 92 Wis. 496.

By the acceptance of the terms of the ordinance, the railroad company assumed a public trust. It undertook to serve the public, by affording it rapid transit; and it became its duty to continue that service, not simply because it had contracted so to do, but because it had become charged with such duty by legislative grant. It could not lay down the burden when it chose, nor emancipate itself by merely ceasing to operate its cars. In case of attempt on its part to so shirk its duty as to a part of its road, it could, doubtless, be compelled, in proper proceeding, to resume its operation, and carry out the public duty which it voluntarily assumed. *Attorney General v. W. W. R. Co.* 36 Wis. 466–497. Certainly, in such case, action could be brought under sec. 3241, R. S., by the state, to forfeit its franchises and vacate its charter, for failure to exercise its public powers and perform its duties.

Coming now to the question whether the franchise has been extinguished in the case before us, it is quite apparent that there are only four ways in which it can be claimed that such extinguishment could take place, viz.: (1) By operation of some self-executing forfeiture clause in the grant;

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(2) by surrender of the franchise, and acceptance of such surrender on the part of the state; (3) by the decree of a court of competent jurisdiction, in an action brought for the purpose; (4) by abandonment or nonuser for so long a period that a surrender and acceptance will be presumed. There are no facts in the case upon which it can be claimed that the franchise has been extinguished in either of the first three ways above mentioned. There was no self-acting forfeiture clause in the ordinance which granted the franchise. There has been no surrender thereof, and acceptance of such surrender by the state, and no action has been brought to declare and enforce the forfeiture. There remains, then, for consideration, only the question whether it has been wiped out by nonuser for more than four years. It is argued that from this fact an abandonment of the franchise has resulted. It is evident that the term "abandonment," as applied to a corporate franchise of this kind, is a misnomer. A mere privilege or right may, perhaps, be properly said to be abandoned in a proper case, although even in that case there must be something more than mere nonuser to constitute such abandonment. There must also be an act clearly indicating an intention to abandon. Washb. Easements (3d ed.), 661. But, while a mere easement or right may be abandoned, the word is plainly inapplicable to a duty owing to the state. A public duty is not to be laid down at will. In the case of a mere easement there is but one party interested, and he may voluntarily abandon his right; but in case of a public duty there are two parties beneficially interested,—i. e. the party who owes the duty, and the state to which the duty is owing. The necessary result must be that, in order to extinguish the duty, there must be concurrence on the part of the state. It has been held that a total nonuser of the franchises of a corporation may exist for so long a period and under such circumstances that a surrender of its franchises by the corporation, and

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acceptance of such surrender on the part of the state, will be presumed. The cases holding this doctrine are cited in *Combes v. Keyes*, 89 Wis. 297, and *Attorney General v. S. & St. C. R. Co.* 93 Wis. 604. The doctrine cannot be said to have been adopted by this court, however. In *Combes v. Keyes*, which approaches nearest to it, there had been complete nonuser for twenty-six years, and legislative acts impliedly accepting the surrender; and it was held that the corporation had passed out of existence. Similar is the case of *Henderson v. C. P. R. Co.* 21 Fed. Rep. 358, where nonuse of a street-car franchise for ten years, followed by a repeal of the franchise and a legislative grant of the same right to another company, was held to extinguish the first franchise. The present case, however, is not such a case. The period of nonuse here was about four years and eight months. It was a period of great industrial depression, and of extraordinary financial difficulties on the part of the various corporations which successively owned the franchise. The old track became, by reason of the change in means of locomotion, practically worthless, and its entire reconstruction a necessity. It appears by affidavits of officials of the roads that it was always the intention to resume operation of these two blocks as soon as the financial atmosphere cleared. An ordinance declaring this franchise, with others, forfeited was introduced in the common council; but, upon representation by the company that it was the intention of the new company to operate the road over these blocks in the near future, the clause forfeiting the franchise on the two blocks in question was stricken out. The only fact which can be claimed to indicate an *intention* to abandon the franchise is the fact that in 1892 the street was paved with wooden blocks, at the expense of the adjoining property owners, and that the old rails and ties were then taken up, with the knowledge and consent of the company. This fact, however, loses much of its apparent significance in view of the

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changes in roadbed made necessary by the introduction of electricity, and in view, also, of the other facts just referred to.

This, then, is the situation: There has been no cesser to use, accompanied by any act clearly indicating an intention to abandon the right. Even if it could be said that there was any such act, there has been no consent on the part of the public to such abandonment, nor acceptance of a surrender. The nonuse has not existed for such a length of time, or under such circumstances, that a surrender and acceptance of the franchise can be presumed. It follows that, when the plaintiffs commenced their action, the franchise was still in existence, and consequently the injunctional order was erroneous.

By the Court.— Order reversed, and action remanded for further proceedings according to law.

MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Appellant, vs. CITY OF MILWAUKEE, Respondent.

December 18, 1896 — January 12, 1897.

Street railways: Franchises: Forfeiture, how decreed.

While the state has delegated to cities the authority to act for it and on its behalf in granting franchises to build and operate street railways, it has not granted to them the power to institute and maintain actions to forfeit such franchises for misuse or abuse. Such a forfeiture cannot therefore be decreed in a suit in equity brought by the city, but must be adjudged by action in the name of the state under sec. 3241, R. S.

APPEAL from orders of the superior court of Milwaukee county: R. N. AUSTIN, Judge. *Reversed.*

This is an action in equity, brought by the plaintiff company, to enjoin the city of *Milwaukee* from tearing up or

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removing the tracks which it had commenced to lay on the 24th day of May, 1896, on two blocks of Washington avenue, or Twenty-Seventh street, in the city of *Milwaukee*, between Wells street and Chestnut street. These are the same blocks involved in the action of *Wright v. Milwaukee Electric R. & L. Co.*, *ante*, p. 29; and this action is a branch of the same contest. The facts stated in that case will not be restated. It is sufficient for the purposes of this appeal to state that after the preliminary injunctional order had been issued and served in the *Wright Case*, preventing the street-railway company from completing its tracks on the blocks in question, and on the 25th day of May immediately following, the board of public works of the city of *Milwaukee* made a written order and served the same upon the railway company, directing it to repave and restore the street and remove all the railway tracks, ties, and other obstructions therefrom within twenty-four hours from the service of the order. Thereupon, on the 26th day of May following, the railway company commenced this action, and, upon a verified complaint setting forth its rights in the street and the action of the board of public works, obtained an order to show cause why the board of public works should not be restrained during the pendency of the action from taking up the plaintiff's tracks and ties, and from interfering with the plaintiff in the construction of the tracks; and until the hearing of the motion a temporary restraining order was granted. The defendant city thereupon appeared, and served an answer setting forth the nonuse of the street by the plaintiff company for more than four years as a defense to the action, and also setting forth, by way of counterclaim, practically the same facts as to nonuse and abandonment of the street, and prayed a perpetual injunction against the railway company preventing it from constructing its lines or operating its cars upon said street. Upon the hearing of the order to show cause, the plaintiff's application for an

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injunction *pendente lite* was denied, and the temporary restraining order dissolved. Afterwards the motion of the defendant, based upon the counterclaim, restraining the plaintiff *pendente lite* from constructing its line or operating cars over the street in question, was granted. Thereafter the plaintiff served a general demurrer to the defendant's counterclaim, and, upon argument thereof, the demurrer was overruled. From these three orders, the plaintiff appealed.

For the appellant there was a brief by *Miller, Noyes, Miller & Wahl*, and oral argument by *Geo. P. Miller*.

Charles H. Hamilton, city attorney, and *Howard Van Wyck*, assistant city attorney, for the respondent.

WINSLOW, J. It was held in the case of *Wright v. Milwaukee Electric R. & L. Co.*, *ante*, p. 29, that the street railway's franchise to operate a street railway upon the street in question had not lapsed or been lost at the time it commenced to relay its tracks. We shall not go over the ground again in the present case. Practically the only question remaining in the present case is whether the city can successfully maintain an action in equity to prevent the relaying of the tracks on account of the nonuse of the street for nearly five years. It will be readily seen that, if it can do so, the action will be practically an action brought to declare a forfeiture of the franchise to operate a railway upon that piece of street. This question can be answered logically in but one way, and that is in the negative. The franchise was the grant of the state. It was granted through the medium of the city, but, in making the grant, the city exercised the power of the state and acted on its behalf. While the state has delegated to the city the authority to grant franchises of this character, it has not granted to the city the power to institute and maintain an action to forfeit the franchise for misuse or abuse. It has reserved to itself, acting through its attorney general and by leave of this court first

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obtained, this very important and delicate right and duty. This is the clear purpose and effect of the provisions of sec. 3241, R. S., and the decisions made thereunder. Such leave is a necessary prerequisite to the bringing of the action, and the granting or refusing thereof lies in the sound discretion of the court. *State ex rel. Att'y Gen. v. Janesville Water Co.* 92 Wis. 496. These considerations seem amply sufficient to dispose of this case. The franchise exists. It had not been lost by nonuser, or forfeited by surrender, or by judgment of the court; and, if it is to be forfeited, it must be done in the way pointed out by the statute. It follows that all the orders appealed from must be reversed. The company had a right to rebuild its track and resume the performance of its public duty, and it was therefore entitled to an order restraining interference with such right.

The converse of the proposition necessarily follows, namely, that the city had no right to an order preventing the company from relaying its tracks. The counterclaim stated no cause of action, because a forfeiture cannot be declared by bill in equity brought by the city. It must be done by action in the name of the state, under sec. 3241, R. S.

By the Court.— Orders reversed, and action remanded for further proceedings according to law.

See note to this case in 36 L. R. A. 45.— REP.

MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Plaintiff, vs. CITY OF MILWAUKEE and another, Defendants.

December 18, 1896 — January 12, 1897.

Taxation: Exemption of property of street railway: Construction of statute: Constitutional law.

1. Ch. 363, Laws of 1895 — requiring street-railway companies to pay license fees based on their gross receipts, and providing, in sec. 6, that the payment of such fees "shall be in lieu of all other taxes,

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assessments and licenses of any such corporation, and all personal property, franchises and real estate owned by such company or corporation shall be exempt from assessment and taxation; except that all land or lots unimproved, or having buildings thereon, owned by such person, company or corporation, shall be liable to taxation for state, county and school purposes,"— clearly exempts from taxation all property owned by such companies, and not merely such as is used for railway purposes.

2. Sec. 3, art. XI, Const. (providing that "it shall be the duty of the legislature, and they are hereby empowered, to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent abuses in assessments and taxation, and in contracting debts by such municipal corporations"), does not prevent the legislature from exempting the property of street-railway companies from special assessments for local improvements.

APPEALS from an order of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Reversed on plaintiff's appeal; affirmed on that of the defendants.*

This is an action to enjoin and restrain the city of *Milwaukee*, its officers, etc., from selling, offering for sale, or returning delinquent, certain special taxes assessed or levied against the property of the plaintiff, described in the exhibit annexed to the complaint, and from issuing any certificate or certificates of sale thereon, and praying that the assessment and levy of said taxes or special assessments be declared void and of no effect, etc.

It appeared from the complaint that the plaintiff was a corporation, created and existing for constructing and equipping, leasing, maintaining, and operating by electricity or other power street railways for the transportation of passengers and material in the city and county of Milwaukee, and for other purposes; that its property consisted of about 120 miles of railway track, mostly within said city, together with all posts, wires, and other furniture incidental to and used by a street railway operated by electricity, and that

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the plaintiff had acquired certain pieces of real estate in various portions of the city upon which are situated its power houses, barns, paint shops, and other buildings necessary for the conduct of its business; that it had paid, pursuant to ch. 363, Laws of 1895, to the state treasurer, before February 1, 1896, a sum of money equal to the percentage of its gross receipts for the twelve preceding months as shown by its duly-verified statement as filed with the county treasurer of Milwaukee county, and as provided by said statute; that the said defendant city assessed all the real estate of said plaintiff for state, county, and school purposes, and, in addition thereto, had assessed against said property special assessments for various purposes, namely, street sprinkling, repairing sidewalks, laying water pipe, removing snow, for general city, interest, and ward tax, and certificates of the board of public works for grading, graveling, paving, and curbing streets, amounting in all to $1,219.15, in items shown in the exhibit annexed to the complaint, and it was charged that said special assessments were assessed without authority of law, illegally, and contrary to the express provisions of the statutes of the state; that the defendants threaten and are about to collect said taxes, and sell said real estate, and to issue the usual certificates of sale thereon to the purchaser of said property; and that the assessment and levy of said taxes constitute a cloud upon the title to said real estate. It was also stated in the complaint that the plaintiff was ready and willing and thereby offered to pay any taxes or assessments which the court might determine it should in justice pay.

A temporary injunctional order was granted at the time of the commencement of the action, in substance as prayed for. The defendants, in their answer, alleged that the plaintiff had, in addition to the property necessary for its use in its street-railway business, and essential and devoted to that business, other real estate, not so essential and devoted, but

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which was vacant or unused property, and part of which was leased for purposes entirely foreign to the street-railway business, and upon which some of the assessments set forth in the complaint were levied; and it was denied that the special assessments set forth in the complaint were assessed by the city, without authority of law, and expressly alleged that by the terms of sec. 12, subch. XX, ch. 184, Laws of 1874, being the charter of the city of *Milwaukee*, it was provided that real estate exempted from taxation by the laws of the state should be subject to special taxes, as other real estate, and that said provision had not been repealed; and the defendants denied that it was within the power of the legislature to prohibit the city of *Milwaukee* from levying special assessments upon real estate for benefits arising thereto from improvements made pursuant to law, and denied that all of the plaintiff's property was an entirety, which could not be divided and sold separately, but alleged that numerous parcels and parts of the real estate owned there were not essential to the enjoyment of its franchises, and in no wise constitute a portion of an entirety; and, except as above denied, defendants admit all the allegations of the complaint.

Motion was made to vacate the preliminary injunction, upon which a reference was made to a court commissioner to take testimony and report to the court as to what use, if any, was made of plaintiff's real estate mentioned in the complaint, and whether the same was improved or unimproved. The referee reported that all of the described property, except certain specified lots, was used by the plaintiff for railroad purposes. The court confirmed the report of the referee, and ordered that the temporary injunction be vacated and set aside as to the tracts not used for railroad purposes, and that it be granted and continued in force as to the other assessments mentioned in the complaint. From that part of the order vacating said injunction in part the

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plaintiff appealed, and the defendants appealed from so much of the order as granted and continued the injunction as to the assessments on lots used for railroad purposes.

For the plaintiff there was a brief by *Miller, Noyes, Miller & Wahl*, and oral argument by *Geo. P. Miller.*

C. H. Hamilton, city attorney, for the defendants.

PINNEY, J. 1. By sec. 6, ch. 363, Laws of 1895 (the act to provide for the payment of licenses by street-railway companies within this state), it is provided that the license fee therein provided for "shall be in lieu of all other taxes, *assessments* and licenses of any such corporation, and *all personal property, franchises and real estate* owned by such company or corporation *shall be exempt from assessment and taxation;* except that all land or lots unimproved, or having buildings thereon, owned by any such person, company or corporation, shall be liable to taxation for state, county and school purposes." This action concerns certain city assessments, which are special taxes. The exemption of the lots in question from these assessments is in clear and unqualified terms, and it is shown that the plaintiff had paid its annual license fee, as required by the statute, which was required to be computed as follows: "One per cent. on the first $250,000 of its gross receipts; one and one-half per cent. upon the gross receipts over $250,000, and not exceeding $500,000; and two per cent. on all amounts over $500,000." The validity of this act was not questioned as being in conflict with sec. 1, art. VIII, of the constitution, which requires that "the rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe;" and it appears to be in conformity with the construction this provision of the constitution received in *Wis. Cent. R. Co. v. Taylor Co.* 52 Wis. 37; *Wis. Cent. R. Co. v. Lincoln Co.* 57 Wis. 142, and *Green Bay & M. C. Co. v. Outagamie Co.* 76 Wis. 588. It is contended that the exemption in question

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should be construed as if it had been expressly limited to property of the street-railway company *used for railway purposes*, and the circuit court so construed it. We are unable to arrive at this conclusion, for to do so would require us to read into the statute words not found in it, and to give effect to a supposed intent not indicated by the language of the act. The exemption from assessment extends "to *all* personal property, franchises and real estate owned by any such company." This court holds that in all such cases "it is the duty of all courts to confine themselves to the words of the legislature, nothing adding thereto, nothing diminishing." *Hanson v. Eichstaedt*, 69 Wis. 546. We have no right to import into the act a limitation or restriction not found in it. The case of *Brightman v. Kirner*, 22 Wis. 58, is decisive against the contention of the defendants, and, if it were a question of construction, the act would have to be liberally construed in favor of the street-railway company, for the reasons stated in *Milwaukee & St. P. R. Co. v. Milwaukee*, 34 Wis. 271; *Milwaukee & St. P. R. Co. v. Crawford Co.* 29 Wis. 116; *State ex rel. Abbot v. McFetridge*, 64 Wis. 130. It is true that exemptions of property from taxation are, in general, to be construed strictly; but in the present case there is no language in the act justifying or requiring construction. The terms of the act are so clear as to exclude all occasion for it. If the act is unfair and inequitable, that is a question for the legislature, and the courts have no power to remedy it.

2. It is contended that the legislature has no power to exempt the plaintiff's lots from assessments, for the reason that sec. 3, art. XI, of the constitution provides that "It shall be the duty of the legislature, and they are hereby empowered, to provide for the organization of cities and incorporated villages, and to *restrict* their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments and

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taxation, and in contracting debts by such municipal corporations." The power of imposing assessments, such as are here in question, is essentially a legislative power delegated to the city and its proper officers, in like manner as the power of general taxation. The argument of the defendants' counsel would prove too much, and show that the legislature could not select the subjects of taxation, so as to exempt from taxation a particular class or kind of property, as the powers of assessment and taxation are mentioned in the same connection. The power of the legislature to exempt particular classes or kinds of property from taxation is well settled. Assessments are special taxes, and the power to exempt particular classes or kinds of property from assessments stands on as clear and undoubted ground as the power to make exemptions, in such cases, from general taxation. The entire matter of assessments was made a subject of legislative regulation and control, and we see no reason for doubting or denying the validity of the exemption claimed. It follows from these views that the part of the order appealed from by the plaintiff must be reversed, and the part appealed from by the defendants must be affirmed.

By the Court.— Judgment is ordered accordingly, and the case is remanded to the circuit court for further proceedings according to law.

SAUNDERSON and others, Respondents, vs. HERMAN, Appellant.

December 19, 1896 — January 12, 1897.

Municipal corporations: Special assessments: Change of grade: Damages: Proceedings void on their face: Extrinsic evidence of regularity.

1. Under the charter of the city of Milwaukee, where an established grade is altered in the improvement of a street, the contractor's certificate therefor is absolutely void unless it affirmatively ap-

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pears on its face that the damages from the change of grade were considered by the board of public works in making the assessment. *Liebermann v. Milwaukee*, 89 Wis. 336, followed.

2. Where special assessment proceedings are absolutely void on their face for failure to comply with the charter, it cannot be shown by extrinsic evidence that the charter provisions have been complied with.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Affirmed.*

The plaintiffs are owners of certain lots, fronting on Cape street, in the Sixth ward of the city of Milwaukee. The defendant is the owner of certain improvement certificates issued against the plaintiffs' lots. The action is to have the certificates surrendered and canceled. The defendant answered, setting up the proceedings on which the certificates had been issued. The answer was struck out as frivolous, and judgment rendered, on proper proofs taken by the plaintiffs, canceling the certificates. The appeal is from this judgment.

It appears that the grade of Cape street had been permanently established, and the street made to grade and paved with macadam, in 1883. In 1894 the grade of the street was changed by being raised from six tenths of a foot, in some places, to one and six-tenths feet in other places. The work of changing the grade and repairing the street was let, the work was done, and the certificates were issued to the contractors. The defendant bought the certificates. The complaint sets out, *verbatim*, the assessment of benefits and damages which was made and filed by the board of public works. It is apparently made on the same blank as the assessment in the case of *Liebermann v. Milwaukee*, 89 Wis. 336, and does not show that damages from the change of grade were considered by the board. The answer takes no issue upon the form of the assessment, but alleges affirmatively that the board considered the question of such damages and determined that there were none.

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For the appellant there was a brief by *Hoyt, Ogden & Olwell*, and oral argument by *F. M. Hoyt.* They contended, among other things, that it clearly appeared, and was in effect admitted by plaintiffs' pleadings, that no damages were done to their premises, and in such a case equity would grant them no relief. *Wis. Cent. R. Co. v. Ashland Co.* 81 Wis. 10; *Fifield v. Marinette Co.* 62 id. 535; *Meggett v. Eau Claire*, 81 id. 326.

Herbert Knight, for the respondents.

NEWMAN, J. The change of grade of Cape street, though not great, might very well be of considerable damage to the respondents' property. At least, it cannot be presumed that it would be without damage. The respondents might well stand upon their legal right to require benefits and damages to be assessed according to law. No valid charge against their lots could be created except by a strict adherence to the authority given by the city charter. The only assessment of benefits and damages which was made by the board of public works, before making the contracts and ordering the work, is in the exact form and words of the assessment which was condemned in *Liebermann v. Milwaukee*, 89 Wis. 336. It seems to have been made upon the same blank. Both assessments having been made under the same charter, it seems necessarily to follow that that case must govern this. The attempt is made to avoid the rule in that case by allegations in the answer that the board of public works did duly consider the matter, and "were of the opinion that no damage would result to the plaintiffs [respondents] by reason of such change of grade," and "the plaintiffs' [respondents'] property was not damaged in any manner whatever by such change of grade." While these allegations might be sufficient under the general rules of pleading, they make no issue here, because the assessment of benefits and damages actually made by the board of public works is attached to the complaint and made a part of it, and its accuracy is

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conceded, for no issue is made upon it by the answer. In *Liebermann v. Milwaukee*, *supra*, it is said that "the certificate is void upon its face for failure to show affirmatively that it was made in conformity with the authority conferred upon the board of public works by the provisions of the charter." There is no way in which a void proceeding can be made valid by evidence. If it were only *prima facie* or *apparently* void, evidence might aid it. The reason why it is void is the necessity that it shall "show affirmatively on its face" a compliance with the power conferred. For this reason the assessment itself is the only competent evidence to show a compliance with the charter. 1 Greenl. Ev. § 86; Blackwell, Tax Titles, 248, 512 [§§ 448, 1100 *et seq.*]; Black, Tax Titles, § 446; *Iverslie v. Spaulding*, 32 Wis. 394. No evidence could be received under these allegations of the answer. The answer states no defense.

By the Court.— The judgment of the circuit court is affirmed.

PFISTER, Respondent, vs. SMITH and another, Appellants.

December 19, 1896 — January 12, 1897.

Personal service of summons on nonresident: Court commissioner: Waiver of defects: Vacating judgment by default: Discretion.

1. Under sec. 2815, S. & B. Ann. Stats. (authorizing a court commissioner to exercise the powers of a circuit judge at chambers except where an order or proceeding is authorized to be made or taken by the presiding judge or circuit judge), and sec. 2640, R. S. (providing that an order for the personal service of a summons without the state may be made by the court or a judge thereof), such an order may be made by a court commissioner.
2. A general appearance by a defendant and a motion by him to set aside a judgment by default constitute a waiver of defects in the service of the summons.
3. Where a motion to set aside a judgment by default against nonresident defendants is made in their name by their assignee in in-

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solvency, for the purpose of obtaining possession of property in this state for administration in such proceedings, and it appears that the defendants made no effort to defend; that their assignee under a voluntary assignment had merely instructed attorneys in this state to interpose an answer which would delay proceedings until it should be determined whether a defense ought to be made, but had not put them into possession of the facts upon which to base a defense, or informed them that personal service on the defendants had been had without the state; and that such attorneys had not put in such defense within twenty days because they supposed service had been obtained by publication, the denial of the relief sought is *held* not to be such a clear abuse of discretion as to warrant a reversal.

APPEAL from an order of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

The action was commenced January 20, 1896, to recover upward of $47,000, alleged to be due for money loaned to the defendants as partners. Pursuant to an order regularly made on the 21st day of January, 1896, by a court commissioner for Milwaukee county, the summons and complaint were personally served on the defendants at Boston, in the state of Massachusetts, on the 23d day of January, 1896. The property of defendants, situated in this state, was duly attached by proper proceedings in the case, January 20, 1896. Such proceedings were had that the attached property was sold according to law, for $7,000, on the 13th day of February, 1896. Judgment was duly rendered by default, the same day, for $41,348.52. On the 11th day of March thereafter, notice of motion was served on plaintiff's attorneys for an order setting aside the default, and allowing the defendants to come in and defend. Such motion was based on a verified answer, denying that plaintiff loaned to the defendants any of the money mentioned in the complaint, save and except the sum of $1,000, which sum was admitted to have been due and unpaid at the time of the commencement of the action, with interest thereon from December 26, 1895. The motion was also based on an affi-

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davit by Charles T. Hickox, one of the attorneys for the moving parties, to the effect that defendants, at their place of residence, Boston, Massachusetts, on the 20th day of January, 1896, assigned their property to Charles H. Edson and Charles W. Fifield, for the benefit of creditors; that, on the 31st day of January thereafter, such assignees instructed the firm of attorneys of which the affiant was a member to enter an appearance in the action for defendants; that affiant did not know that service had been made personally on defendants, and for that reason and on account of the press of business he neglected to carry out his instructions. There was also an affidavit by defendant *Stoughton* to the effect that all the sums of money mentioned in the complaint, save and except about $3,000, were loaned to defendant *Smith* personally, and that $2,000 of such sum was paid before the commencement of the action.

In opposition to the motion, there was an affidavit by Charles Quarles, one of plaintiff's attorneys; also one by W. C. Quarles, and one by *Charles F. Pfister*. The latter was to the effect that such proceedings were duly had in a court of the state of Massachusetts having jurisdiction of the subject that the assignment made by defendants, January 20, was set aside, and the assets of the defendants taken possession of by an assignee appointed by such court for the purpose of administering the same under the insolvent laws of such state, which laws provide for a discharge of the insolvent from his debts in a manner not recognized by the laws of this state; that plaintiff resides in this state, and that substantially all the other creditors are nonresidents; that all the moneys loaned by plaintiff were used by the defendants as firm capital. The motion was denied, and from the order entered thereon this appeal was taken.

For the appellants there was a brief by *Elliott, Hickox & Groth*, and oral argument by *C. T. Hickox*.

For the respondent there was a brief by *Quarles, Spence & Quarles*, and oral argument by *Charles Quarles*.

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MARSHALL, J. The first question raised on this appeal is, Has a court commissioner power to grant an order for the service of a summons by publication, or, in lieu thereof, service without the state, under sec. 2640, R. S.? That provides that such an order may be made by the court or a judge thereof. Sec. 2815, S. & B. Ann. Stats., provides that "where these statutes authorize an order or proceeding to be made or taken by the presiding judge, or by the circuit judge, using such words of designation, no county judge or court commissioner can act. Except as so provided, or otherwise expressly directed in particular instances, a county judge or court commissioner may exercise within his county the powers, and shall be subject to the restrictions thereon, of a circuit judge at chambers, according to existing practice and these statutes, in all actions or proceedings in courts of record." Under such section, the word "judge" must be construed to include county judge or court commissioner. *Clark v. Bergenthal*, 52 Wis. 103. It follows that sec. 2640, taken in connection with sec. 2815, must be construed as if it read: "The court, or judge thereof, or the county judge, or any court commissioner of the county in which the action is commenced, may make an order for service by publication," etc. Moreover, in this case the general appearance by defendants, and motion to set aside the default on the ground of excusable neglect, constitute a waiver of all questions of jurisdiction and defects in the service. *Dikeman v. Struck*, 76 Wis. 332; *Eureka S. Heating Co. v. Sloteman*, 67 Wis. 118.

A motion to set aside a judgment taken by default is addressed to the sound discretion of the court, and, in order to disturb its decision, it must be made to appear clearly that there has been an abuse of such discretion. *Kalckhoff v. Zoehrlaut*, 43 Wis. 374; *Seymour v. Chippewa Co.* 40 Wis. 62. Unless the answer tendered sets forth facts sufficient to constitute a good and meritorious defense and the default is satisfactorily excused, the motion may properly be

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denied. *Jefferson Co. Bank v. Robbins*, 67 Wis. 68. Here it appears that the defendants failed to make any effort whatever to defend the action before judgment, and though the answer thereafter tendered, on the motion to open the default, is in their names and verified by one of them, the assignee appointed by the Massachusetts court in the insolvency proceedings appears to be the real moving party. The end sought obviously is to obtain possession of the property in this state for administration in such insolvency proceedings. The assignees appointed in the first instance by the defendants appear to have had full authority to act in their behalf. They knew of the commencement of the action on the 23d day of January, 1896, yet gave no directions to the attorney to defend prior to the rendition of the judgment. He was directed by letter, dated the 29th day of January, 1896, to appear and put in some kind of an answer for the purpose of keeping the case open. That can hardly be called a direction to defend. Nothing further was done until about the 9th day of March, 1896, when the proposed answer, tendered on the motion, was forwarded to the attorney to enable him to make such motion. From this it is clear that defendants and their assignees wholly neglected to put their attorney in possession of the facts, so that he could either advise them respecting the case, or interpose an answer in their behalf, till nearly a month after the rendition of judgment; and no satisfactory excuse for such neglect appears in the moving papers. The affidavit of the attorney is to the effect that he did not appear in time because he did not know that personal service had been made upon the defendants in Massachusetts; but no satisfactory excuse is offered why such defendants or their assignees did not give the attorney such information, or why he did not obtain the same himself from the records of the court. Moreover, if he had been fully possessed of all the facts in that regard, he could not have interposed an answer because of the failure of de-

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fendants and their assignees, as before stated, to furnish him with a statement of the facts relied upon as a defense. In view of these facts, and the showing that the money loaned, whether direct to *Smith* or to both defendants, was used in the business of the partnership, we cannot say that the record shows a clear abuse of judicial discretion in the making of the order appealed from; hence the order must be affirmed.

By the Court.—The order is affirmed.

LOUIS F. FROMER & COMPANY, Respondent, vs. STANLEY and another, Appellants.

December 19, 1896—January 12, 1897.

(1) *Special verdict.* (2) *Sale of chattels: Fraudulent representations: Replevin: Return of notes.*

1. The submission of thirty-eight questions to be answered in the form of a special verdict, in a case involving only two or three simple issues, is criticised as tending to confuse and mislead the jury.
2. Neither an accidental remark by a merchant that he "considered himself worth from $10,000 to $20,000 clear," made in conversation with the agent of a manufacturer but not connected with any negotiations or sales (being simply the expression of an opinion), nor the statement of the merchant at the time of making a subsequent purchase that he would discount his bills the following January (being a mere promise), even though false, could form the basis of an action to reclaim goods subsequently sold, on the ground of fraud.

[3. Whether an action of replevin can be maintained without returning notes given for the goods replevied, not determined.]

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

It appears from the record that, during the times mentioned, the plaintiff was a manufacturer and wholesale dealer

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in cigars, in the city of New York; that, during the same times, one John A. Stapleton was a retail dealer in cigars in the city of Milwaukee; that between November 15, 1894, and March 21, 1895, the plaintiff had sold and delivered to Stapleton a large quantity of cigars of different varieties, and for which the plaintiff had taken Stapleton's notes; that March 25, 1895, one Evans recovered two judgments against Stapleton, aggregating $2,219.33, and on that day issued executions thereon to the defendant *Stanley*, as sheriff, and he immediately levied upon Stapleton's stock, and took the same into his possession as such sheriff, under such executions; that thereupon and on the same day, the said Stapleton made a general assignment for the benefit of his creditors to the defendant *Whitnall*, who immediately qualified and took possession of the property so assigned to him, subject to such levy; that March 27, 1895, the plaintiff demanded of the defendants the cigars in their possession which had been sold to Stapleton by the plaintiff, but which the defendants refused to deliver up; that March 28, 1895, the plaintiff commenced this action of replevin, to recover possession of such cigars, on the ground that the plaintiff had sold the same to Stapleton on his false representation as to his solvency.

At the close of the trial, the jury returned a special verdict, answering thirty-eight questions, to the effect that Stapleton did, October 26, 1894, state to the plaintiff's agent Henry G. Alces that he (Stapleton) considered himself worth from $10,000 to $20,000 clear, but that Stapleton at that time was not worth from $10,000 to $20,000 clear, and he (Stapleton) then knew or ought to have known that such estimate of his financial condition was not true; that such representation was made by Stapleton to deceive Alces, and for the purpose of inducing Alces to make sales to him upon credit, and Alces believed such representation to be true; that, after such representation was made, Alces did sell to

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Stapleton all the cigars involved in this action, except the 1,325 Patti Perfecto cigars, the 5,000 Conchas Finas, ordered January 10, 1895, and the 7,800 Horseshoe cigars included in the contract of resale made on March 21, 1895; that Alces would not have made said sales if it had not been for the representation of Stapleton; that Alces relied upon said representation mentioned; that Alces informed the plaintiff that Stapleton represented to him that he considered himself worth from $10,000 to $20,000 clear, but did not inform it that Stapleton represented to him that he considered himself worth about $20,000 clear; that Alces reported such representation to the plaintiff within two weeks from October 26, 1894; that the plaintiff did believe the representation of Stapleton so communicated to it by Alces to be true; that the plaintiff did sell cigars to Stapleton upon his direct order January 10, 1895; that plaintiff, in making such sale January 10, 1895, relied upon the representation of Stapleton as it was so communicated to it, and, in filling the order from Alces for Stapleton, relied upon the representation of Stapleton as so communicated to it, and would not have made such sales and filled such orders if it had not been for the representation of Stapleton as so communicated to it; that March 21, 1895, Stapleton represented to the plaintiff that he was then solvent, but such representation was false, and Stapleton then knew or ought to have known such representation to be false, but such representation was made by Stapleton to deceive the plaintiff, and for the purpose of inducing the plaintiff to sell goods to him on credit; that the plaintiff believed such representation by Stapleton as to his solvency; that after such representation, on March 21, 1895, the plaintiff made a resale of goods to Stapleton; that there were included in such resale, March 21, 1895, 4,100 Adelina Patti Favoritas cigars, 4,150 Reina Perfecto, 9,250 Conchas Finas, and the 7,800 Horseshoe cigars; that the plaintiff relied upon the representation of Stapleton that he

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was solvent, in making such resale; that when Stapleton purchased the goods, March 21, 1895, he had the preconceived purpose of not paying for them at all, or only a per cent. thereof; that the defendant *Whitnall* unjustly detained from the plaintiff the cigars described; that the defendant *Stanley* unjustly detained from the plaintiff the case of cigars described, of the value of $450; that the value of the cigars replevied in this action, and included in the sale of March 21, 1895, was $943.78; that none of the cigars involved in this action were sold to Stapleton before October 26, 1894, except the 1,325 Adelina Patti Perfectos.

From the judgment entered upon such verdict accordingly, the defendants bring this appeal.

For the appellants there was a brief by *Elliott & Hickox*, and oral argument by *C. T. Hickox*.

For the respondent there was a brief by *Henderson & Williams*, attorneys, and *Geo. E. Sutherland*, of counsel, and oral argument by *Mr. Sutherland*.

CASSODAY, C. J. 1. The submission to the jury of thirty-eight questions in the form of a special verdict, to determine the simple issues here involved, necessarily tended to confuse and mislead the jury, and hence is open to the criticism which this court has frequently made in similar cases. *Eberhardt v. Sanger*, 51 Wis. 74, 76, and numerous cases there cited; *Heddles v. C. & N. W. R. Co.* 74 Wis. 257, 258; *Montreal River L. Co. v. Mihills*, 80 Wis. 551–555; *Ohlweiler v. Lohmann*, 88 Wis. 78. No additional force can be given to such criticism by repetition. Such criticism is not obviated by the fact that the appellants requested the submission of fifty-six questions which the trial judge must have regarded more objectionable than those which he did submit.

2. The case is simple and necessarily turns upon two or three questions. One of them is as to the false representation found by the jury to have been made by Stapleton to

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the plaintiff's agent Alces, October 26, 1894, to the effect that he "considered himself worth from $10,000 to $20,000 clear." It appears that Stapleton had been in the tobacco and cigar business for more than twenty years; that, as such dealer, he had been acquainted with Alces for eight or nine years; that during that time he had, through him, bought cigars of the father of Alces before he became the agent of the plaintiff; that during those years he had "had more or less conversation with Stapleton as to his means;" that September 8, 1894, Alces sent to the plaintiff Stapleton's first order for cigars; that September 18, 1894, the plaintiff wrote Stapleton, in effect thanking him for the order so given by him to Alces for 25,000 cigars, of which 15,000 were to be sold to the retail trade, and promising to put up the cigars in good shape, and ship them in two or three weeks, and expressing the belief that, by careful attention and the assistance the plaintiff would give him, he would "be able to build up a very large trade" in the plaintiff's cigars; that Stapleton objected to the letter, and at first refused to accept of the cigars, unless the plaintiff would dispose of, or aid him in disposing of, the 15,000 to the retail trade; that October 15, 1894, the plaintiff shipped the cigars so ordered to Stapleton; that the purchase price of those cigars was $1,408.70, on a credit of four months' time; that, after Stapleton received the 25,000 cigars so shipped to him, he and Alces went to Racine, to sell the 15,000 mentioned to the retail trade. Mr. Alces testified that as he and Stapleton were returning to Milwaukee, on the cars from Racine, Stapleton said to him: "Well, how do you like this?" He replied that it was a pretty tough day. Stapleton then said: "Well, I have been doing this for a great many years, as you know." He then said to Stapleton: "Yes, but you have no reason to complain." Stapleton then asked, "Why?" He replied: "Why, you must be worth from $20,000 to $50,000." Stapleton then "poo-hooed at

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the idea of $50,000, but on our way told me in words plainly that he considered himself worth from $10,000 to $20,000 clear anyhow." Alces further testified to the effect that he believed such statements to be true when he subsequently sold goods to Stapleton; that, when he made such subsequent sales, Stapleton said he would discount the bills in the next January; that in the absence of such representations and his statement that he would discount the bills in January, upon which he relied, he would not have made such subsequent sales. Stapleton testified to the effect that Alces never said to him that he (Stapleton) must be worth from $20,000 to $50,000, and that he never told Alces "that he considered himself worth from $10,000 to $20,000 clear anyhow," and that he never promised to discount bills in January. And he further testified that according to his inventories, at purchase prices for new goods, and reduced prices for old goods, his stock was, according to his books kept during the time, as follows: January, 1890, $13,377.66; January, 1891, $16,309.40; January, 1892, $12,759.34; January, 1893, $13,122.75; July, 1893, $10,809.63; January, 1894, $10,400; January, 1895, a little over $10,000; that his bills receivable and due him in January, 1895, on outstanding accounts, were about $16,000; that his assets in January, 1893, exceeded his liabilities by $16,800; that his assets in January, 1894, exceeded his liabilities a little over $10,000, and in January, 1895, a little less; that in March, 1895, his total indebtedness, including the plaintiff's, was about $17,000. The assignee realized out of the whole stock and assets only about $7,000.

Assuming that October 26, 1894, Stapleton did state to Alces that he "*considered* himself worth from $10,000 to $20,000 clear," as found by the jury, and that such statement was untrue, nevertheless the making of the statement, under the circumstances stated, was, in our judgment, a mere casual expression of opinion, not connected with any

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contract of sale or proposed sale, and hence not the basis of an action to reclaim the goods subsequently sold, on the ground of false representation or fraud. Alces had known Stapleton, and, in behalf of his father, had sold him goods for many years; and, a few weeks before, he had contracted, in behalf of the plaintiff, to sell him goods of the value of more than $1,400, on long credit, and which goods the plaintiff had already delivered, without Alces or the plaintiff asking any question as to his (Stapleton's) responsibility. Under such circumstances, and after completing the business of the day at Racine, and while riding home on the cars, an accidental remark of Alces induced Stapleton to say that he "considered himself worth from $10,000 to $20,000 clear." It is not stated as an existing fact, but merely that he "considered" himself worth that amount, — in other words, that that was his estimate or opinion of his then present worth; and the fact that he said from $10,000 to $20,000 shows that he was not claiming to have any definite knowledge or well-defined opinion on the subject; and, besides, he was talking to a man who, from the nature of things, would naturally be supposed to know more or less about his financial condition. There is nothing to indicate that the statement was dishonestly made, or made with intent to deceive or defraud the plaintiff or any one. The mere fact that, after the failure, the proceeds of the stock and assets were much less in value than the liabilities, does not prove that Stapleton so regarded them in October, 1894,— nine months after his last inventory,— or that they were so in fact.

The trial judge charged the jury to the effect that they knew from their own experience, and that the evidence in the case confirmed the same, "that the value of merchandise in such business as Mr. Stapleton's was changeable and fluctuating;" and yet he charged the jury that "the law presumes that a party knows his financial condition." A

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merchant is not at all times conclusively presumed to know his own financial condition when the same is dependent upon values which are changeable and fluctuating, and certainly he cannot know what his stock would bring in cash at any particular time on forced sale. This court has gone, perhaps, as far as any court in holding that false representations of facts, *which have induced* the making of a contract, may be actionable, although not shown to have been made wilfully or with fraudulent intent. *Maltby v. Austin*, 65 Wis. 527; *Montreal River L. Co. v. Mihills*, 80 Wis. 540, 560–563, and the cases there cited; *Castenholz v. Heller*, 82 Wis. 30; *Gunther v. Ullrich*, 82 Wis. 228; *Porter v. Beattie*, 88 Wis. 32; *Nash v. Minn. T. I. & T. Co.* 159 Mass. 437; *S. C.* 163 Mass. 574. See what is quoted from *Joliffe v. Baker*, 11 Q. B. Div. 255, *Palmer v. Johnson*, 12 Q. B. Div. 32, *S. C.* 13 Q. B. Div. 351, *Derry v. Peek*, L. R. 14 App. Cas. 377, in the case in 80 Wis. above cited. But in those cases the representations were of matters of fact, and made during the negotiations for the sale.

3. Besides, the plaintiff's agent and witness to whom the alleged representations were made testified to the effect that when he sold Stapleton goods subsequently to October 26, 1894, he asked him if he was not going to discount some of his bills, and that he replied that he would the following January. The language of the witness on this point is as follows: "Q. In the absence of those representations on his part, would you have sold him the goods? Ans. In the absence of those representations, *and had he not stated* he would discount all bills in January, I would not have sold the quantity of goods which I did. Q. Then this statement to you that he was worth from ten to twenty thousand dollars, and that he expected to be prepared on the 1st day of January next to discount the bills, induced you to sell to him these goods? — You relied upon those statements? Ans. Yes. Q. And you made that the basis of

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your order for goods to be sent to John A. Stapleton upon your employers, *Fromer & Co.?* Ans. Yes, sir." So it appears that one of the principal grounds for making such subsequent sales on credit was Stapleton's statement that he would discount the bills in January. But that was not the statement of a fact *in præsenti*, and hence was not the basis of an action for rescinding the sale. *Warner v. Benjamin*, 89 Wis. 290; *Patterson v. Wright*, 64 Wis. 289; *Sheldon v. Davidson*, 85 Wis. 138. It was, at most, a mere breach of promise; and yet, according to Alces' own testimony, he might not have sold the goods at all had not that promise been made. False representations which are not relied upon are not actionable. *Fowler v. McCann*, 86 Wis. 427. The same is true of a false promise, a mere expression of an opinion, a casual remark, not made during the negotiations, or with any intention of influencing the conduct of the opposite party. We must hold that the representations of Stapleton, assuming them to have been made as testified to by Alces and that they were false, were not of such a character as authorized the plaintiff to rely upon them, and avoid the sale in consequence of them.

4. It follows from what has been said that, upon the evidence before us, there is no ground for the recovery for any of the cigars actually ordered and received by Stapleton prior to March 21, 1895. As to any of such cigars there can be no ground for claiming a resale, but at most an extension of credit. If, as some of the testimony seems to indicate, Stapleton claimed to the plaintiff, on the day and year last mentioned, that a certain case of the cigars had never been ordered by him, and especially if he never in fact ordered them, then such case might be the subject of sale on that day. Appellants seem to concede that that case never passed to *Whitnall* by the assignment, but claim that this action cannot be maintained by reason of certain rules of law; while the respondent seems to justify all the find-

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ings which cover the one case mentioned. We are in no position to settle that controversy on this appeal, and hence the same is necessarily left open for the trial court.

5. The opinion expressed renders it unnecessary to determine whether this action of replevin can be maintained without returning the notes given for the goods replevied.

By the Court.— The judgment of the superior court of Milwaukee county is reversed, and the cause is remanded for a new trial.

BODEN, Administrator, Respondent, vs. MAHER and another, Appellants.

December 19, 1896 — January 12, 1897.

Contracts: Condition precedent: Pleading: Evidence: Right to recover liquidated damages.

1. Where payment for grading lots was to be made on certificates of the assistant city engineer, the furnishing of such certificates was a condition precedent to the right to demand or sue for the price of the work, and the performance of such condition must be both alleged and proved, or its performance excused, before there can be a recovery.
2. Where the performance of such a condition precedent had not been alleged in the complaint, the admission in evidence of the engineer's certificates was erroneous.
3. A contract by which plaintiff's intestate was "to do all the excavating which" defendants "desired to have done," to be "fully completed on or before September 1, 1892," was satisfied by the doing of so much of the grading as the defendants desired to have done before said date, so that no recovery could be had by them under a provision for the payment of $10 per day liquidated damages for each day the work remained uncompleted after September 1.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Reversed.*

The action is on a contract for grading certain lots in the

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city of Milwaukee, to recover a balance claimed to be due to the plaintiff's intestate for work done under the contract. The plaintiff's intestate made a contract with the defendants whereby he agreed to "do all excavating which said parties of the first part [the defendants] desire to have done upon certain premises known," etc., under direction of the assistant city engineer and the defendants, for an agreed price per cubic yard. The work was to be paid for on the certificate of the assistant city engineer "showing the work to be properly done and the amount of earth removed," seventy-five per cent. as the work progressed, and the balance six months after the completion of the work. The grading was to be completed by September 1, 1892. The plaintiff's intestate agreed that he would pay to the defendants, "as liquidated damages," $10 a day for each day that the work should remain uncompleted after September 1, 1892. A large amount of grading was done under the contract,—much of it after September 1, 1892, and up to June 1, 1893, when the defendants discharged the plaintiff's intestate, and forbade further performance of the work. The grading was then substantially completed, only a few days' work remaining to be done. Payments were made from time to time as the work progressed, and without certificates of the assistant city engineer. January 16, 1893, a certificate of the assistant city engineer for all the work done previous to that date was furnished, and seventy-five per cent. of the price was paid. No further certificate was furnished before the commencement of the action. Another certificate, dated May 31, 1894, of all the work done after January 16, 1893, was produced upon the trial, and received in evidence, over the defendants' objection.

It was claimed by the plaintiff that all the work which the defendants desired to have done before September 1, 1892, was so done; that the work done afterwards was done under their direction and as they required it, and to their satisfac-

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tion; and that they accepted it fully, as in compliance with the contract, and waived further performance by discharging the plaintiff's intestate. The defendants denied that the contract had been so performed, and claimed to recover the stipulated damages from September 1, 1892, to June 1, 1893. The defendants also insist that plaintiff's action is premature, because brought before the certificate of the engineer for the whole work had been furnished. There was a demurrer *ore tenus* to the complaint on the ground that it does not allege that such certificates had been furnished. There was evidence on the part of the plaintiff which tended to prove that the work had been done under the defendants' direction, and as and when they desired it, and to their satisfaction; and that they accepted it as a satisfactory performance of the contract; and that payments had been made during the progress of the work, without the certificate of the assistant city engineer; and that payments had been so made since the work was stopped, without objection that the contract had not been satisfactorily performed; while there was evidence on the part of the defendants which tended to controvert all these positions.

For the appellants there were briefs by *Hoyt, Ogden & Olwell*, and oral argument by *L. M. Ogden*.

For the respondent there was a brief by *Rietbrock & Halsey*, and oral argument by *L. W. Halsey*.

NEWMAN, J. The appellants allege five several grounds of error, which they deem sufficient grounds for reversal of the judgment: (1) In overruling the demurrer *ore tenus;* (2) in receiving in evidence the engineer's certificate of January 16, 1893; (3) in receiving in evidence the engineer's certificate of May 31, 1894; (4) in refusing to direct a verdict for the defendants; and (5) in directing a verdict for the plaintiff.

1. Payment for the work was to be made on certificates

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of the assistant city engineer. The furnishing of these certificates was a condition precedent to the right to demand or sue for the price of the work. *Hudson v. McCartney*, 33 Wis. 331; *Bentley v. Davidson*, 74 Wis. 420; *Wendt v. Vogel*, 87 Wis. 462. The performance of such conditions precedent must be both alleged and proved, or their performance excused, before there can be a recovery. *Oakwood Retreat Asso. v. Rathborne*, 65 Wis. 177; *Boorman v. Juneau Co.* 76 Wis. 550; 4 Ency. of Pl. & Pr. 627, 630. So, it must be held that the complaint failed to show a right of recovery in the plaintiff. The demurrer should have been sustained.

2, 3. It was error to receive the certificates in evidence. They were irrelevant as proof of any fact made relevant by the pleadings.

4. The plaintiff failed utterly to show, by evidence competent to be received, a right to recover, and a verdict should have been directed for the defendants on that ground. But there was no case to require the direction of a verdict for the defendants, on their counterclaim. There was evidence tending to show that the plaintiff's intestate had fully performed his contract, and that the work had been accepted by the defendants as a full performance of the contract in that respect. The evidence also tends to show that the work was completed within the time limited by the contract. The contract is somewhat indefinite and elastic as to the amount of work which was to be completed before September 1, 1892. The agreement was "to do all excavating which said parties of the first part [the defendants] desire to have done," to be "fully completed on or before September 1, 1892." The plaintiff's testimony certainly tends to show that so much of the grading as the defendants desired to have done before September 1, 1892, was done before that date. If so, there was no breach of the contract, and no foundation for a recovery on their counterclaim. There certainly was enough evidence on this question to support a verdict for the plaint-

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iff. So, it should, on that question at least, have gone to the jury. It was no error to refuse to direct a verdict on the counterclaim. *Leiser v. Kieckhefer*, *ante*, p. 4.

5. It was error to direct a verdict for the plaintiff. The verdict is supported neither by the plaintiff's pleadings nor his proofs.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded for a new trial.

EAN, Executrix, Appellant, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondent.

December 21, 1896 — January 12, 1897.

Railroads: Employee "operating car:" Survival of actions: Construction of statute: Negligence: Pleading.

1. A freight handler, while actually engaged in moving a freight car along the track to the freight house in the course of his employment, was engaged in operating and moving the car within the meaning of ch. 220, Laws of 1893 (making railroad companies liable for injuries to employees, without contributory negligence, received while engaged in operating and moving trains, engines, and cars, through the negligence of any other employee of the company).
2. Under sec. 4255, R. S. (providing that "whenever the death of a person shall be caused by a wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured"), an action may be maintained by the administrator of a deceased railroad employee who was killed while operating cars, etc., through the negligence of another employee or agent of the company, under such circumstances that the deceased if he had lived could have maintained an action for his injuries under ch. 220, Laws of 1893.

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3. In an action for the killing of a railroad employee while engaged in moving a freight car on a side track by being run over by other cars which had been standing on that track, but which were in some manner put in motion, a complaint alleging the negligent failure of the defendant's employees to give warning of the approach of an engine and cars from some point beyond a curve so located as to interfere with the view from the point where the deceased was at work, but failing to allege that there was a curve, or that any cars came from beyond the curve and struck the standing cars, or that other cars were in fact moved upon that track, or that the standing cars were moved by other cars being negligently propelled against them and thereby pushed down upon and over the deceased, is *held* insufficient, even upon demurrer *ore tenus*, to show that the deceased came to his death by reason of cars being negligently propelled against the standing cars.

WINSLOW, J., dissents.

APPEAL from a judgment of the superior court of Milwaukee county: R. N. AUSTIN, Judge. *Affirmed.*

Action to recover damages for the death of George Ean, alleged to have been caused by the negligence of defendant's employees.

It is alleged in the complaint that on the 14th day of November, 1894, deceased was at work for defendant in its freight house in the Fourth ward of the city of Milwaukee, as a freight handler; that it was one of his duties to aid, when requested by the agent in charge of such freight house, in moving cars from points on defendant's tracks near such freight house down in front of the proper door of such freight house for the purpose of unloading such cars; that on the day named a string of cars was standing on track No. 3, the nearest car being about three car lengths from the sixth door of the freight house; that the deceased and three of his co-employees were directed by the agent to take the nearest car in the string and put it opposite such door; that no engine was in sight at that time, and no cars were being moved in the vicinity; that deceased and his associates proceeded to carry out their instructions; that, in

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doing so, deceased and one of his associates, in the exercise of due care, went between the cars, uncoupled the one to be moved, and commenced pushing it to its destination, when noiselessly, and without having given or caused to be given any warning of the approach of any cars, and without having any flagman or other servant there stationed to warn persons of their approach, either along the tracks or on the cars approaching, and without ringing any bell or blowing any whistle, or having any person stationed at any place to warn persons of the cars' approach around the curve on the viaduct, upon said track, and without having any lawful or safe method of notifying said deceased of the approach of any cars or engine, the said defendant then and there, by its servants, agents, and employees in charge of and managing, conducting, and running said cars, so carelessly managed, moved, and conducted the same that by and through the carelessness, negligence, and improper conduct of said defendant, by and through its said agents, servants, and employees, then and there run into and struck, with great force and violence, the string of cars standing upon the track No. 3 aforesaid, from which said deceased had aided to uncouple the car to be switched away, as aforesaid, to the freight house, and thereby forced the said string of cars behind said Ean, and with great force and violence, upon and over him, the said Ean, whereby he was thrown down, and the cars run upon and over him, crushing his arm and leg and side, and causing mortal injury, from which, and on account of which, he died on the 19th day of November, 1894.

The defendant answered, and upon the trial objected to any evidence under the complaint, for the reason that it fails to state facts sufficient to constitute a cause of action. The objection was sustained, and thereupon, on motion, the complaint was dismissed. Judgment was entered in defendant's favor for costs, from which this appeal was taken.

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For the appellant there was a brief by *Rogers & Mann* and *Geo. E. Sutherland*, and oral argument by *Mr. Sutherland.*

C. H. Van Alstine, of counsel, for the respondent.

MARSHALL, J. It needs no discussion to demonstrate from the record in this case that, if any negligence is alleged in the complaint as the proximate cause of the death of the testator, it was the negligence of an employee of the defendant; hence no right of action exists in favor of the plaintiff, unless the deceased, had he lived, could have recovered damages for his injury, of the defendant. It does not appear upon what ground the learned judge of the superior court sustained the demurrer *ore tenus*, but from the briefs of counsel we assume that his decision was based upon the ground, among others, that the deceased was not an employee entitled to the benefits of ch. 220, Laws of 1893. That act received consideration in *Smith v. C., M. & St. P. R. Co.* 91 Wis. 503, and no good reason appears to change in any way the conclusion there reached. It was there said, in effect, in regard to that part of the act applicable to this question, that "the legislative idea plainly was to give a right of action to employees engaged in operating and moving trains, engines, and cars while actually so engaged, and the words used to express such idea are too plain to leave room for resort to the rules for judicial construction to determine their meaning." The test in any given case is, Was the person injured employed in one of the branches of the railway service covered by the act at the time of the injury? If so, he is entitled to its benefits, whether such service was the principal kind of work to be performed by him under his contract of employment, or a mere incident to his general duties. As, in case where an employee is injured by the negligence of another whose general employment is that of a vice principal and such other is temporarily doing the

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work of an employee, the right of the injured party is governed by the nature of the service in which such other is engaged at the time of such injury, so here, whether the deceased, had he lived, would have been entitled to the benefits of the act in question, depends wholly upon whether he was doing the kind of service specified in the act, at the time of the injury. If he was, whether such service required him to assist in running the car a distance of three car lengths or a greater distance, or whether by the power of a locomotive, or by some other means, makes no difference. While actually engaged in moving the car, he was within the extraordinary perils which the act was designed to protect employees against. The conclusion of the trial court to the contrary cannot be sustained.

It was further contended that, even if the deceased would have been entitled to recover of the defendant, had he lived, sec. 4255, R. S., has no application to such a case; hence no cause of action is stated in the complaint in favor of the plaintiff, independent of ch. 280, Laws of 1887, which made some changes in the law respecting the survivorship of actions. Clearly, the right of action in favor of the deceased was lost by his death (*Randall v. N. W. Tel. Co.* 54 Wis. 140; *Meese v. Fond du Lac*, 48 Wis. 323; *McKeigue v. Janesville*, 68 Wis. 50), and, as there is no statute giving a right of action to the personal representatives, except sec. 4255, R. S., if the cause of action in favor of the deceased was lost by his death, unless that applies the complaint is fatally defective. Such section is as follows: "Whenever the death of a person shall be caused by a wrongful act, neglect or default, and the act, neglect or default, is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person

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injured," etc., etc. It will be observed that the statute says that "in every such case the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured." To be sure, the rule of strict construction should apply, as the act is in derogation of the common law (*Eilers v. Wood*, 64 Wis. 422; *Smith v. C., M. & St. P. R. Co.*, *supra*), if the language is open to construction; but, in our judgment, it is not. There is nothing either in the terms or the spirit of the act from which the court can say the legislative idea was to confine its effect to rights of action in favor of injured persons, as the law existed on the subject at the time sec. 4255 was passed. On the contrary, it is too plain to be open to serious discussion that the legislative intent was to give a right of action to the personal representatives of a deceased person in all cases where such person would be entitled to recover damages for his injury if death had not ensued. While it is the duty of the courts to resolve reasonable doubts in favor of the restrictive effect of an act that is in derogation of the common law, it would be going beyond judicial functions to put restrictive words into a law by judicial construction. We hold that sec. 4255 applies to this case, and that the ruling of the trial court to the contrary cannot be sustained.

A further question is presented of whether the complaint shows that the proximate cause of the death of the testator was negligent conduct of defendant's employees while in the discharge of, or failure to discharge, their duties as such. That part of the complaint relied upon as charging negligence is so involved that it is with considerable difficulty that we are enabled to analyze it satisfactorily. We have considered the question of its sufficiency, fully recognizing that, under the liberal rules that govern the construction of pleadings, every reasonable intendment and presumption should be made in favor of it (*Morse v. Gilman*, 16 Wis. 504);

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and that, if the essential facts can be gathered from the pleading or may be reasonably inferred from the allegations, it is good, though such allegations be, in form, uncertain, incomplete, and defective (*Flanders v. McVickar*, 7 Wis. 372; *Horn v. Ludington*, 28 Wis. 81; *Merrill v. Merrill*, 53 Wis. 522; *Miller v. Bayer*, 94 Wis. 123); also that such rules should be applied with strictness in favor of the complaint, when challenged as insufficient by a demurrer *ore tenus*,— and yet the difficulty in determining that the complaint in question alleges a failure of duty constituting negligence on the part of the employees of the defendant does not disappear.

To aid in determining what is, in effect, alleged on the subject of negligence, we transpose somewhat the language of the complaint in that regard, as follows: When the said defendant, without having given, or caused to be given, any warning of the approach of any cars, and without having any flagman or other servant there stationed to warn persons of their approach, either along the tracks or on the cars approaching, and without ringing any bell or blowing any whistle or having any person stationed at any place to warn persons of the cars' approach around the curve at the viaduct upon said track, and without having any lawful or safe method of notifying said deceased of the approach of any cars or engine, then and there, by its servants, agents, and employees in charge of and managing, conducting, and running such cars, so carelessly managed, moved, and conducted the same that by and through the carelessness, negligence, and improper conduct of said defendant, by and through its said agents, servants, and employees, did then and there noiselessly run into and strike with great force and violence the string of cars standing upon the track No. 3, as aforesaid, forcing the same down and upon and over the said Ean, mortally injuring him and causing his death.

It will be observed that the failure to give warning or any

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signal of approaching danger has reference to an approach of cars from some point beyond a curve so located as to interfere with the view from the point where the deceased was at work. But there is no allegation that there was such a curve in fact; no allegation that any cars came from beyond the curve and struck the string of cars; no allegation that other cars were in fact moved upon the track, or in the vicinity of the string of cars. All the allegations respecting negligent conduct other than that respecting a failure to give warning of impending danger referred to the management of the cars, yet there is no allegation that cars were moved in upon track No. 3, upon which the string of cars was located; no allegation that the string of cars was moved by other cars being negligently propelled against it, and that it was thereby pushed down toward, upon, and over the deceased, causing his death. Giving to the language of the pleading the most liberal construction it will reasonably bear, aided by all inferences that can be legitimately drawn therefrom, we are unable to sustain it as a concise statement of facts constituting a cause of action. The defect is not merely one of indefiniteness and uncertainty; it lies in an absolute failure to allege facts sufficient to show that, without fault on the part of the deceased, he came to his death by reason of cars being negligently propelled against the string of cars, thereby causing the same to move down upon the deceased, causing his death. For this reason the complaint is fatally defective, and the judgment must be sustained.

By the Court.— Judgment affirmed.

WINSLOW, J., dissents.

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CONNORS, Plaintiff in error, vs. THE STATE, Defendant in error.

December 21, 1896 — January 12, 1897.

Criminal law and practice: Confessions, when voluntary: Instructions to jury.

1. The determination of the trial court upon a preliminary inquiry as to whether an alleged confession was voluntary is controlling, unless it shall be made to appear satisfactorily that such determination is clearly against the evidence.
2. A confession need not have been volunteered or spontaneous in order to render evidence thereof admissible, it being sufficient if it was made freely, without compulsion, and voluntarily, without promise or persuasion.
3. A confession, made to a chief of police shortly after he had forcibly disarmed the accused person who was in his custody to prevent him from injuring another, is admissible where it appeared that there was an interval between the struggle and the confession; that the accused was not asked to confess; and that no inducements were held out to him and no threats made.
4. An instruction that "the state has sought to prove the defendant's guilt by introducing certain alleged confessions and admissions, and by showing that he was seen, after the burglary, carrying something under his coat," is not an instruction that the defendant was so seen.

ERROR to review a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

The plaintiff in error was convicted of the crime of burglary, and sentenced to imprisonment in the state prison. The commission of the burglary was clearly proved, and not seriously disputed. The question was whether the plaintiff in error was the person who was guilty of it. The more important alleged error is the reception of evidence to prove admissions of guilt made by the plaintiff in error to the chief of police while he was under arrest, and in his custody. The testimony disclosed that, while the plaintiff in error was in jail on the charge of this crime, he got into an angry

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controversy in the jail with one Larkin, and that, when the chief of police interfered to restore quiet, he picked up a poker and raised it towards the chief, in a threatening manner, when the chief seized a cane which was lying on the floor, and struck him several blows with it, and, in the end, forced him over a pile of wood which was lying on the floor. That seems to have been the end of that matter. After the expiration of about half an hour the chief asked the plaintiff in error: "Did you have anything to do with this burglary?" He answered, "Yes, I did." He then told the chief that another man had broken open the door, and that he had taken a part of the goods, and the other man had taken a part, and told where they had disposed of them. Before receiving evidence of these admissions, the trial court made preliminary inquiry on the question whether they had been made freely and voluntarily. It does not appear that the subject of the burglary was mentioned at the time of the controversy in the jail; nor that threats had been made or promises given; nor that the plaintiff in error had been advised to confess. After such inquiry the evidence was received. The plaintiff in error, as a witness in his own behalf, denied both the commission of the crime and the making of the admissions.

D. F. O'Keefe, for the plaintiff in error, to the point that evidence of the alleged confession was inadmissible, cited Roscoe, Crim. Ev. (10th ed.), 42; *Nolen v. State*, 14 Tex. App. 474; *Comm. v. Tuckerman*, 10 Gray, 173; *Comm. v. Curtis*, 97 Mass. 578; *Comm. v. Myers*, 160 id. 530; *People v. Barric*, 49 Cal. 342; *Comm. v. Mitchell*, 117 Mass. 431; *Miller v. People*, 39 Ill. 457; *Comm. v. Sego*, 125 Mass. 210; Phillips, Ev. 86; *Reg. v. Doherty*, 13 Cox, Crim. Cas. 23; *Reg. v. Millen*, 3 id. 507; *Lacey v. State*, 58 Ala. 385; *People v. McMahon*, 15 N. Y. 384; *State v. Phelps*, 11 Vt. 116; *State v. Walker*, 34 id. 296; Rice, Crim. Ev. 492, 494.

For the defendant in error there was a brief by the *Attor-*

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ney General and *John L. Erdall*, Assistant Attorney General, and oral argument by *Mr. Erdall.*

NEWMAN, J. The more important of the errors alleged is the receipt of evidence of the alleged admissions, or, as it is called, confession of the plaintiff in error. It is claimed that it was not shown to have been a free and voluntary confession. It appears that the trial court made preliminary inquiry on this point, and adjudged it to be voluntary. This determination of the trial court is controlling, unless it shall be made to appear satisfactorily that the determination is clearly against the evidence. 19 Am. & Eng. Ency. of Law, 629. Such consideration is due to the judgment of the trial court. The admissions do not seem to have been voluntary, in the sense that they were volunteered or spontaneous. They were elicited by questions. But all that is required in that regard is that they shall be made freely, without compulsion, and voluntarily, without promise or persuasion. It does not appear that the alleged assault upon the plaintiff in error was made in furtherance of any scheme to procure admissions from him him by fear. On the contrary, it seems to have been made in the lawful purpose of disarming him, in order to prevent him from injuring another. There was no allusion to the burglary at the time, and the admissions were not made until after an interval. Nor does it appear that any inducement whatever to a confession was held out or offered. He was not told that it would be better for him to confess or to tell the truth, or anything of that import. He was not asked to confess, or threatened with consequences of a failure to confess. None of these things are seriously claimed. The absence of them quite clearly appeared. The testimony of the chief of police was quite well corroborated, both as to the admissions themselves, and as to the incidents preceding. There is no real ground for questioning the correctness of the ruling of the trial court that

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the admissions were free and voluntary in every legal sense.

Error in the charge to the jury is alleged. The court said, "The state has sought to prove the defendant's guilt by introducing certain alleged confessions and admissions, and by showing that he was seen, after the burglary, carrying something under his coat." It is said that the testimony conflicts as to whether the plaintiff in error was seen, after the burglary, carrying something under his coat. It is claimed that this instruction took the question from the jury. It is said to be equivalent to an instruction that he was seen. A very simple analysis will clearly show that this is not the effect of the instruction. The phrase "has sought to prove . . . by showing," very clearly, is not equivalent, either grammatically or in the common usage of the language, to the phrase "has shown" or "has proved." And it should not, naturally, be so understood by the jury.

The other alleged errors do not require treatment at length.

By the Court.—The judgment of the circuit court is affirmed.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Plaintiff, vs. FOREST COUNTY and others, Defendants.

December 22, 1896 — January 12, 1897.

Assessment and collection of taxes: Special law limiting taxation: Constitutional law: Equity: Seizure of personal property of railroad to satisfy tax.

1. The restriction of subd. 6, sec. 31, art. IV, Const., against the enactment of special legislation "for the assessment and collection of taxes or for extending the time for the collection thereof" embraces all the proceedings for raising money by the exercise of the taxing power from the inception of the proceeding to its conclusion,

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and took from the legislature all power, past, present, and future, of special legislation on the subject. Laws, therefore, limiting the amount which it shall be lawful for a certain county and the several towns therein to raise and expend for the various purposes for which taxes may be levied, are unconstitutional and void. [Whether such laws are in violation of sec. 23, art. IV, Const., providing for a uniform system of town and county government, not determined.]

2. The objection that a town tax was void because the resolution authorizing it failed to specify the specific purposes for which it was to be expended is not available in an action in equity to set aside the tax and enjoin its collection.

3. Property of a railroad company, such as coal and tools for use in repairing the tracks, necessarily used in operating the road, is not liable to seizure and sale on execution to satisfy a tax, and an injunction may properly be issued to prevent such seizure and sale. *Hill v. L. C. & M. R. Co.* 11 Wis. 223, and *Chicago & N. W. R. Co. v. Ft. Howard*, 21 Wis. 44, overruled.

APPEALS from a judgment of the circuit court for Forest county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

This is an action to set aside and enjoin the collection of certain county taxes and of town and school taxes in the town of *Crandon*, Forest county, for the year 1895, on the ground that they were levied greatly in excess of the limits imposed by ch. 270, Laws of 1887, as amended by ch. 505, Laws of 1889, and ch. 39, Laws of 1891, as extended by ch. 283, Laws of 1893, and ch. 338, Laws of 1895; plaintiff being a large owner of real estate in the said town of *Crandon*. The complaint alleged certain irregularities in the levying of the taxes, and asked that the defendants be enjoined from collecting such portion thereof as was claimed to be illegal and inequitable. *Forest* county was organized by ch. 436, Laws of 1885; and by ch. 270, Laws of 1887, the amount of taxes which the county and which its towns might raise in any one year was limited, and succeeding statutes enlarged the limitations, until, in 1895, the limit of county taxes was $1,500 for county roads, and $10,500 for other county pur-

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poses, and of town taxes in *Crandon*, $3,500 for town and $550 for school purposes. Nevertheless, for that year, the county voted a tax, no part of which was for roads, of $21,137.84, and the town a tax of $2,500 for town and $3,000 for school purposes. These taxes, in due proportion, were extended on the plaintiff's lands to the amount of $6,098. The plaintiff affirms, and the defendants deny, that the limitations are constitutional, and on this question depends the validity of the taxes in excess of the amounts thus limited. The town meeting voted the town tax of $2,500 "for all town purposes," and the plaintiff claims that this tax is void, because not voted for any specified, authorized purpose.

The court, after trial, held that the taxes were valid, and plaintiff appealed from the part of the judgment which sustains the taxes, and the defendants appealed from the part of said judgment which enjoined and restrained the collection of said taxes from and out of certain personal property at Monico Junction, belonging to the plaintiff, namely, twelve coal buckets, one shovel, all coal in the shed, four lamps, one pick, and two scoop shovels; and two hand cars, one push car, and five coal buckets at Pratt Junction, which property had been seized for the payment of said taxes. And it was alleged that it was necessarily used, and necessary for use, in operating said railroad and carrying the mail, and in the performance of the plaintiff's duties as public carrier, and to the exercise of its franchise to operate said railroad; that, unless plaintiff could continue to use the same, its said business of transportation and carrying the mail would be seriously interrupted, and the running of its trains would be disarranged and confused; that the coal buckets, chains, and coal shovels are part of the plaintiff's hoisting apparatus and machinery, necessary at all times for handling said coal, and the use and running of locomotives; that said cars and tools and other property were necessary to

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maintain the track of said road in safe condition, and their seizure and sale would endanger life and property in the business of such transportation.

George G. Greene, for the plaintiff, contended, *inter alia*, that the limitation of sec. 31, art. IV, Const., does not apply to the laws limiting the amount of taxes which might be *raised* or *expended* in towns of *Forest* county. Had they limited the power to *vote* taxes, they plainly would not have been within the constitutional prohibition. To vote taxes is to determine their purpose and amount. It is by the legislature directly, or by its delegates. When voted or determined, the taxes must be *assessed* — apportioned to the taxables of the district for which they were voted. The word "assessment" sometimes includes the listing and valuation of taxables; sometimes only their valuation; *never* the act of voting the tax. Under every meaning — legal, literary, and statutory — "assessment" presupposes an existing tax, and is the manner of imposing it on persons or property. Cooley, Taxation, 324, 332, 351, 352; 25 Am. & Eng. Ency. of Law, 199, note 2; *People v. Weaver*, 100 U. S. 539. A law cannot be said to be for assessment or collection of taxes, or special as to them, when it leaves them to be made under existing general laws precisely as every tax in every town and county in the state is assessed and collected. Many hundreds of special laws, enacted since sec. 31 was adopted, regulate the power to tax, by directing, authorizing, or limiting taxes, and thereby affect their amounts. Such laws are not "for the assessment or collection of taxes." *Simon v. Northup*, 27 Oreg. 487; *State ex rel. Williams v. Fogus*, 19 Nev. 247; *Binkert v. Jensen*, 94 Ill. 283; *Harrison v. Milwaukee Co.* 51 Wis. 658, 659. An intent to forbid all special laws affecting taxes would have been expressed quite otherwise than by the words of subd. 6. The prohibition would have been against such laws on the subject of taxation, or for voting or levying taxes, as well as for assessing and collecting them. It is certain there are laws on the subject of

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taxes which are not for their assessment and collection. *Expressio unius est exclusio alterius.*

Samuel Shaw and *A. W. Shelton*, attorneys, and *L. W. Bliss* and *M. J. Wallrich*, of counsel, for the defendants.

PINNEY, J. 1. The county of *Forest* was created by ch. 436, Laws of 1885. As thus created, it consisted of two towns therein, named, respectively, Sand Lake and Pelican; and the general laws of the state, in respect to the assessment, levying, and collection of taxes, became applicable to it. By ch. 270, Laws of 1887, the territory of the county was divided into three towns, named therein, respectively, Pelican, *Crandon*, and Gagen. By the second section of this act it was provided: "It shall be unlawful for any town in said county *to raise or expend* an amount exceeding $2,500 in each year, for five years, for town purposes, and it shall be unlawful for any town in said county *to raise or expend* an amount exceeding $1,500 in each year for five years, for school purposes. The total amount of taxes *to be raised or expended* in all the towns in *Forest* county for town and school purposes, shall not exceed the sum of $12,000 in each year, for five years. And whenever any town whose boundaries are fixed by section one of this act, is divided into two or more towns within five years, the amount of $2,500 for town purposes, and of $1,500 for school purposes hereby fixed for said town, shall be correspondingly divided, and each part thereof shall be the tax for town and school purposes for each such subdivision." These restrictions were extended by subsequent statutes, and the amounts increased, until 1895, when the limit of county taxes for county roads was $1,500 and $15,000 for other county purposes, and of town taxes in the town of *Crandon* was $3,500 for town and $550 for school purposes. The taxes for 1895 for both town and county purposes, as stated, were largely in excess of these limitations.

The defendants insist that the legislation imposing these

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restrictions is unconstitutional and void, and that the taxes are valid, upon the ground that such legislation is in violation of subd. 6, sec. 31, art. IV, of the constitution, by which the legislature is prohibited from enacting any *special* or private law "for the assessment or collection of taxes or for extending the time for the collection thereof;" and it is contended that the legislation in question, so restricting taxation in the county of *Forest* and the several towns thereof, is *special* legislation, and is for that reason void. We think that this objection is well taken. The power to levy taxes is undoubtedly one which belongs exclusively to the legislative department, and, when exercised by a delegate town or city, through its officers, the legislature only exercises a power through its subordinate agents which it could exercise directly. *Meriwether v. Garrett*, 102 U. S. 472; *New Orleans v. Clark*, 95 U. S. 644. It is not questioned but that the laws under consideration are *special* laws. By sec. 32, art. IV, Const., it is provided that "the legislature shall provide *general* laws for the transaction of any business that may be prohibited by section 31" of that article. It is argued that the enumeration "for assessment and collection of taxes" does not embrace every law on the subject of or affecting taxes, and every law not so included may be special, and that the test whether a law relating to taxes is or is not for their assessment or collection is that a law which fixes or affects the time or mode of apportioning taxes to taxables or persons, or of enforcing the taxes so apportioned, is "for the assessment or collection of taxes," and must be general; all others are not, and may be special. The difficulty with this contention is, we think, that it construes the provision too strictly and literally, and without regard to the manifest purposes of the section. The object of sec. 31, art. IV, Const., was to restrict and lessen the evils of special legislation, so appropriately and vigorously stated by RYAN, C. J., in *Kimball v. Rosendale*, 42 Wis. 415.

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When *Forest* county was organized, the general statutes of the state applied to the matter of taxation for county, town, and school purposes, in every aspect in which it might be considered, as it did in every other county in the state. This condition, as to *Forest* county, was so far changed by the legislation in question, which was special in its character, that it was made *unlawful* for the county, or any town in it, to "raise and expend" amounts for the several purposes stated, except those named in the acts relating to *Forest* county, in any one year. Thereafter the law for imposing and collecting county, town, and school taxes in *Forest* county was a *special* law, applicable only to that county, with restrictions or limitations not existing as to any other county in the state. The argument of plaintiff's counsel overlooks the scope of the statute, which extends to and renders unlawful any and all proceedings whatever for raising taxes in excess of the sums stated in the county and towns named. The sense and meaning of the constitutional prohibition is as broad as the language of the statute, and extends to all the various proceedings required to be taken "to raise" money by taxation. It forbids the enactment of special laws touching the entire subject and method of taxation. This was the construction placed upon the constitutional prohibition in *Kimball v. Rosendale*, 42 Wis. 407, and is decisive of the question. There the act under consideration was to validate taxes that had been charged and extended upon the roll which had not been lawfully voted or levied, and it was urged that the constitutional amendment of 1871 did not forbid the enactment of a special law curing a defective execution of a power previously existing, and that the act there in question was not properly an act "for the assessment and collection of taxes," the same argument that is urged in support of the legislation here in question. But the contention failed, for the reason that the power to levy, or authorize a levy of, a tax by special act, had been taken

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away by the constitutional amendment; and that "a legislature constitutionally restrained from authorizing a thing cannot ratify the thing imperfectly done, under another authority given before the restraint; it cannot ratify what it cannot do, for its ratification must carry present authority back to the time of the thing ratified;" and that all the cases "supporting legislative authority to pass curative statutes are expressly or tacitly rested upon the power of the legislature to do in the present what it ratifies in the past." It was accordingly held that the power to ratify the void tax by a special act did not exist, because the legislative power to then impose or authorize it by special act had been taken away, and that in this respect there was "no distinction between retrospective and prospective legislation." By this case the phrase "for the assessment or collection of taxes" was thus construed as synonymous with the power to impose or raise taxes; and, as said in *Prentice v. Ashland Co.* 56 Wis. 345–346, "the word 'assessment' goes *to the whole statutory method of imposing taxes upon property.*" We cannot, therefore, hold that the power to pass special laws for imposing or levying taxes survived the constitutional amendment.

The construction that plaintiff's counsel puts on the provision is too narrow, and ignores in a very great measure the evils of special legislation intended to be suppressed by it, and is quite too technical as applied to the construction of a constitutional provision. The language of the provision is not used in any restricted or technical sense, and the words "assessment and collection of taxes," as already remarked, were designed to include the whole operation of raising taxes, from commencement to termination. The words "assessment" and "levy," as applied to taxation, have been variously defined. The word "levy" has been held synonymous with collect, and that to "assess" a tax is to declare it payable, and to "levy" is to collect it, or raise it.

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Anderson, Law Dict.; *Vallé v. Fargo*, 1 Mo. App. 345; *Moore v. Foote*, 32 Miss. 469–479. We consider that the word "assessment," in the constitutional provision, is not used in the limited sense of valuing property for the purpose of apportioning taxes. The same view of the scope of the constitutional prohibition was taken in *Nevil v. Clifford*, 63 Wis. 435–447, where it was held that there was no difference between a special act validating a void judgment against a school district, and which would make it the duty of the tax officers to levy a tax to pay it, and a *special* act which, in terms, directed such tax to be levied; and is also sustained by and in harmony with the cases of *State ex rel. Sanderson v. Mann*, 76 Wis. 479–480, and *State ex rel. Turner v. Bell*, 91 Wis. 271. The present case illustrates, in a striking manner, the evil policy of special legislation on the subject of taxation, if the legislation in question can be sustained; for, in a period of about eight years, there have been as many as five special acts on the subject of taxation in this county, to say nothing of the resulting confusion, uncertainty, and litigation. We hold, therefore, that the restriction against special legislation "for assessment or collection of taxes or for extending the time of payment thereof," embraces all the proceedings for raising money by the exercise of the power of taxation, from the inception of the proceeding to its conclusion, and took from the legislature all jurisdiction, past, present, and future, of special legislation on the subject. The question whether the legislation under consideration is not violative of sec. 23, art. IV, of the constitution, which provides for a uniform system of town and county government, was quite elaborately argued, but, for the reasons already stated, it becomes unnecessary to express any opinion upon this branch of the case.

2. The objection that the town tax of $2,500 was void by reason of the general terms of the resolution for raising it, no specification being made therein of the specific purposes

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for which it was to be raised, is not available. This precise question was considered and determined, under the provisions of the charter of the city of Superior, substantially as broad as the provisions of the statute in relation to raising town and school taxes (*Hayes v. Douglas Co.* 92 Wis. 429), and, whatever effect might be given to the objection, in an action at law, to a failure to itemize the tax, it is not available in a court of equity to enjoin or restrain its collection, as the objection does not go to the very groundwork of the tax, and necessarily affect materially its principle, and show that it must be unjust and unequal. It is not enough to authorize the granting of equitable relief in such cases, that the tax proceeding is irregular or void. It must also appear that it is inequitable. *Hixon v. Oneida Co.* 82 Wis. 515. The portion of the judgment appealed from by the plaintiff is correct, and must be affirmed.

3. The part of the judgment appealed from by the defendants must be affirmed. The property seized for the tax in question was, at the time of its seizure, necessarily used in running and operating plaintiff's line of road, and the defendants, their officers, etc., were enjoined by the judgment from selling such property, and from seizing or selling for taxes any personal property of the plaintiff, used and necessary for use, in the operation of its road. The franchises and rights of a *quasi*-public corporation, owing important duties to the public, and the property vested in it necessary for their use and enjoyment and the accomplishment of the purposes for which it was created, constitute an entirety, and, in the absence of special statutory authority, are not subject to be seized and sold on execution, or for mechanics' liens, or on tax process. *Yellow River Imp. Co. v. Wood Co.* 81 Wis. 559–562; *Chapman Valve Mfg. Co. v. Oconto W. Co.* 89 Wis. 264; *Buncombe Co. Comm'rs v. Tommey*, 115 U. S. 122, 128; *Chicago, M. & St. P. R. Co. v. Milwaukee*, 89 Wis. 515; *State ex rel. Milwaukee St. R. Co. v. Anderson*, 90 Wis. 550. The

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subject is fully considered in these cases, and an injunction is proper to prevent such seizure and sale. In the cases of *Hill v. L. C. & M. R. Co.* 11 Wis. 223, and *Chicago & N. W. R. Co. v. Ft. Howard*, 21 Wis. 45, the court acted upon the theory, without actually considering and deciding the question, that the franchises of a railway company, and its property in use and necessary for their exercise and enjoyment, were not an entirety. These cases are not in accord with subsequent decisions in this and other states, and are not to be regarded as authority on the question. The portion of the judgment appealed from is correct, and must be affirmed.

By the Court.— The part of the judgment appealed from by the plaintiff, and the part appealed from by the defendants, are affirmed.

BROWN, Respondent, vs. COHN and another, Appellants.

November 10, 1896—February 2, 1897.

Notice of lis pendens: *Purchase of tax certificates pending suit to annul:* Res adjudicata.

1. One who purchases a tax certificate while a suit is pending to cancel it, to which his vendor is a party, is bound by the judgment in such suit, though no notice of *lis pendens* was filed. The rule of the common law as to purchasers *pendente lite* governs such a case, and is not abrogated by sec. 3187, R. S., relating to the filing of notices of *lis pendens*, but that statute applies only to the cases provided for therein.
2. The filing of notice of *lis pendens* is not necessary where the subsequent purchaser has actual notice, or when he is not a *bona fide* purchaser. The purchaser of a tax certificate is not protected as a *bona fide* purchaser, but he buys it subject to all its defects and infirmities.

APPEAL from a judgment of the circuit court for Oneida county: S. D. HASTINGS, Jr., Judge. *Affirmed.*

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Brown vs. Cohn and another.

Action of ejectment. The plaintiff claims title to the lands in controversy under a patent from the United States, issued to him in 1873. The defendants claim under a tax deed issued by Lincoln county to one C. J. Winton, November 10, 1883, on the tax of 1879 and sale of 1880. The lands had been bid in at the tax sale for the county, and the certificates of sale were issued to the county. The county sold the certificates to one John Comstock. They were not assigned to him, but were simply delivered, with the name of the county treasurer indorsed without designation of his official character. While Comstock yet owned the certificates in 1881, the plaintiff brought an action in the circuit court for Lincoln county against Lincoln county, its county clerk, John Comstock, and others, to set aside the tax for 1879 on these lands, to cancel the certificates, and to restrain the county and county clerk from issuing tax deeds upon the certificates. A temporary injunction, forbidding the issuing of tax deeds, was issued and served. No written notice of *lis pendens* was filed in the action. In March, 1892, judgment was rendered in that action for the relief asked, in substance, as above stated.

During the pendency of that action, on November 10, 1883, Winton procured the tax deed under which the defendants claim to be issued to him. It was based upon certificates which John Comstock owned at the time of the commencement of the action. The tax deed was at once recorded. The lands were vacant and unoccupied for more than three years after the recording of the tax deed. By sundry mesne conveyances by quitclaim deeds, the tax title has come to the defendants.

The trial court found, as a fact, that the certificates were owned by Comstock at the time of the commencement, and were transferred by him during the pendency, of the action; that the judgment in the case of *Brown v. Lincoln County and others*, annulling the tax and tax certificates on which

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defendants' tax deeds were based, is binding and conclusive upon all parties claiming thereunder; that the tax deed was void, and would not support the three years' statute of limitations,—and gave judgment for the plaintiff, from which the defendants appeal.

For the appellants there were briefs by *Brown & Pradt* and *H. C. Hetzel*, and oral argument by *Neal Brown*. They contended that R. S. sec. 3187, changes the rule of the common law, so that the mere pendency of a suit in equity does not now affect the alienation of real property. *Newman v. Chapman*, 14 Am. Dec. 766, 775; *Leitch v. Wells*, 48 N. Y. 585; *Hayden v. Bucklin*, 9 Paige, 512; *Smith v. Gale*, 144 U. S. 509, 527; *Richardson v. White*, 18 Cal. 103. A tax certificate is an instrument evidencing an interest in lands, and under R. S. sec. 1140, it may be recorded. *Eaton v. Manitowoc Co.* 44 Wis. 489; *Horn v. Garry*, 49 id. 464; *Lessees of Rice v. White*, 8 Ohio, 216; *Dikeman v. Dikeman*, 11 Paige, 484; *Smith v. Clarke*, 7 Wis. 551; *Smith v. Ludington*, 17 id. 334; *Sherman v. Bemis*, 58 id. 343; Black, Tax Titles, §§ 301, 312. The holders of tax certificates are necessary parties to an action affecting the title to land. *Adams v. Filer*, 7 Wis. 307, 321; *Siegel v. Outagamie Co.* 26 id. 70; *Crites v. Fond du Lac Co.* 67 id. 236; *Hebard v. Ashland Co.* 55 id. 145; *Smith v. Milwaukee*, 18 id. 369; *Ostrander v. Darling*, 127 N. Y. 70.

For the respondent there were separate briefs by *Raymond, Lamoreux & Park* and *Alban & Barnes*, and oral argument by *B. B. Park* and *John Barnes*.

The following opinion was filed November 24, 1896:

NEWMAN, J. The question principally argued on this appeal, and which seems to be decisive of it, is whether defendants' title under the tax deeds is concluded by the judgment in *Brown v. Lincoln County et al.* The claim of the plaintiff is that they are so concluded, while the defendants claim

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that they are not concluded by the pendency of the action at the time of the purchase of their predecessor's title, because no notice of *lis pendens* was filed in that action. This, then, is the question: Whether the mere fact of the pendency of the action, without the actual filing of a notice of *lis pendens*, brings the case within the doctrine of *lis pendens*. The object of *lis pendens* is not, primarily, notice, but to hold the subject of the suit, the *res*, within the power of the court, so as to enable it to pronounce judgment upon it. It is deemed that every person is bound to know the law, and to take notice of what is transpiring in the courts, from the time when the process is served and the complaint filed until the final judgment is entered. The purchaser *pendente lite* is deemed to be represented in the litigation by his vendor, and the purchaser is just as much bound by the final judgment rendered as is the party whose right he purchases. 13 Am. & Eng. Ency. of Law, 868 *et seq.*; *Murphy v. Farwell*, 9 Wis. 102–106. This is, in effect, the law of *lis pendens* as applicable to this case, unless the common-law rules relating to the subject have been abrogated and superseded by the statute (R. S. sec. 3187). But that statute, evidently, was intended to apply to only a part of the cases to which the doctrine of *lis pendens* applies. It has no negative words or repealing clause. It was evidently intended to be supplemental to the common law, and not to repeal it. So, the common law will govern in all cases not covered by the statute. It has been held by this court that the object of that statute is to conclude subsequent *bona fide* purchasers or incumbrancers, *pendente lite*, by a constructive notice. The filing of the notice is not necessary where the subsequent purchaser has actual notice, or where he is not a *bona fide* purchaser. *Coe v. Manseau*, 62 Wis. 81–90; *Wis. Cent. R. Co. v. Wis. River L. Co.* 71 Wis. 94–107. The purchaser of a tax certificate or a tax title is not a *bona fide* purchaser.

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He buys under the rule *caveat emptor*. He takes the title subject to its infirmities. He knows that such a title grows out of proceedings hostile to the real owner, by which it is sought to divest him, *in invitum*, of his title, and that such a title is liable to be defeated by whatever irregularities or omissions may be in the proceedings. Cooley, Taxation (2d ed.), 475, 476; *Hixon v. Oneida Co.* 82 Wis. 515–530.

Nor can one be a *bona fide* purchaser of tax certificates who takes them without legal assignment. He does not get legal title to them. It seems clear that the purchasers of these certificates were not such parties as the statute was enacted to protect, but that, on the contrary, they were parties who bought at their peril, who were bound to take notice of the pending action, in which the validity of the certificates and the tax proceedings on which they were based was in the process of adjudication. And the defendants must be held to be bound by that adjudication. The judgment in *Brown v. Lincoln County et al.* swept away all foundation from under the tax deeds, and left them without support in previous proceedings. They were issued entirely without the authority of the law, and in defiance of the power of the court. They are utterly without authority. They are not tax deeds, under the statute, and are utterly incapable of supporting the statute of limitations. The effect of the judgment on this tax title is the same as it would have been if John Comstock had taken the tax deed, instead of Winton. A purchaser from him could get no better title than he had. *Lis pendens* binds both parties and privies. A purchaser *pendente lite* is assumed to have notice of the proceedings, because he is bound to take notice of the proceedings of the courts. If Comstock had taken the deed, no defense of the statute of limitations would have been available by him; for the action was already commenced and pending, in which his tax title and the previous proceedings

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were annulled. The defendants are in no better predicament.

By the Court.— The judgment of the circuit court is affirmed.

A motion for a rehearing was denied February 2, 1897.

BARTZ, Receiver, Respondent, vs. PAFF, Executor, imp., Appellant.

BARTZ, Receiver, Appellant, vs. PAFF, Executor, and others, imp., Respondents.

November 10, 1896 — February 2, 1897.

Vendor and purchaser: Specific performance: Lien of judgment: Trust: Notice.

1. The fact that a parol contract for the sale of land, to be paid for out of the proceeds of the timber, does not specify any time for the payment of the purchase money, does not render it so uncertain as not to be enforceable in equity, but the money is payable on demand.
2. Where several parcels of land are included in one parol contract of sale, part payment of the purchase money and a delivery of possession of one of those parcels, is sufficient to enable the purchaser to enforce specific performance of the contract as to all the parcels.
3. Such a purchaser has an equitable title to the land, though the legal title remains in his vendor; and a judgment duly docketed against the purchaser attaches as a lien upon his equitable title, and is good as against all persons except purchasers in good faith, without notice of the lien. CASSODAY, C. J., dissenting, holds that actual knowledge of the rendition of the judgment should be held no less potential in equity than actual knowledge of the docketing.
4. The vendor, in such a case, holds the title, to the extent of the purchase money paid, as trustee for those beneficially interested therein; first for any creditor of the purchaser who has obtained a judgment lien thereon, and then for such purchaser.

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5. If such vendor, by direction of the purchaser, sells and conveys a part of the land to a third party who buys in good faith and without notice of the judgment lien, the title will pass to him free from the lien, and the trust will attach to the purchase money in the hands of the vendor, and he will be liable to account therefor as trustee, if he pays it over to the original purchaser, unless he does so without knowledge of the existence of such judgment lien. CASSODAY, C. J., dissenting, holds that the amount received by the vendor on such sale should be applied as payment on the purchase money due him from the original purchaser, thus increasing the lien upon the remainder of the land.
6. The docketing of a judgment is not notice, at common law, to anybody dealing with the judgment debtor, nor is it made so by any statute of this state.

APPEALS from a judgment of the circuit court for Marathon county: CHAS. V. BARDEEN, Circuit Judge. *Affirmed on plaintiff's appeal; reversed on that of the defendant.*

Action by the receiver of a judgment debtor to reach certain property in which the debtor had an interest, and subject it to the satisfaction of the judgment.

This cause was commenced against Jacob Paff and others. Subsequently he died, and the cause was duly revived against his representative. The complaint, by appropriate allegations, sets forth that in March, 1883, a cause of action for damages accrued to Edward Meier against defendant Henry Paulus, growing out of negligent treatment by the latter of the former while he was under the care of Paulus, as superintendent of the Marathon county poorhouse; that in 1886 an action was commenced in the circuit court for Langlade county, Wisconsin, to recover damages for such negligent treatment; that such action was prosecuted in the circuit court and in the supreme court till judgment was finally rendered in Meier's favor, and against Paulus; that the judgment was docketed in Langlade county on the 20th day of September, 1889, and in Marathon county on the 26th day of September, 1889. The complaint further sets forth that, after the cause of action accrued, defendant Paff con-

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tracted to sell eighty acres of land in Marathon county to Paulus for $10 an acre, and eight per cent. interest per annum thereon till paid; that said contract was made with the understanding that Paff should retain the title, in order to hinder and delay the satisfaction of Meier's claim; that Paulus went into immediate possession of the land, and thereafter, on the 21st day of October, 1890, sold forty acres thereof to defendant *Herman Lemke* for $500; that Paff made the requisite conveyance, and Paulus received the consideration; that prior thereto ten acres of the land were sold, the conveyance made, and consideration passed in the same manner; that the remainder of the land was largely paid for, but that the title remained in Paff; that such dealing was pursuant to a fraudulent agreement and purpose to defeat Meier in the collection of his claim, participated in by both Paff and *Lemke*.

The complaint further sets forth that, after the rendition of the judgment, such proceedings were duly had for the collection thereof that plaintiff was appointed receiver of the property of Paulus; that he then brought this action to have the title to the land decreed to have been in Paulus from the date of his contract with Paff, and to have the deed to *Lemke* declared void as to plaintiff, or, if that could not be done, for judgment for damages against Paff.

The defendants answered, putting in issue all allegations of fact made to charge them on the ground of fraud.

The trial resulted in finding, among other things, the existence of all the facts alleged in the complaint respecting Meier's claim, judgment, and the appointment of the receiver; also, that in 1884 or 1885 Paff made a verbal contract with Paulus to sell to the latter the land mentioned in the complaint, for the price there alleged, Paulus to have the privilege to take timber therefrom and sell the same, paying the proceeds, as received, to Paulus, to apply on the purchase money; that Paulus entered upon the land, made im-

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provements thereon, and paid of the purchase money $400; that two parcels of the land were sold, deeded, and the consideration passed to Paulus, as alleged in the complaint, save and except the sum of $70 retained by Paff, for interest, out of the first sale of ten acres; that Paff knew at the time of the sale to *Lemke* of the judgment against Paulus, and had constructive notice of the docketing of the same in Marathon county; that *Lemke* purchased in good faith, without notice that Paulus had any interest in the land.

The effect of the findings on this point is that *Lemke* supposed Paulus was merely acting as agent of Paff in making the sale. The court further found that Paulus had an enforceable contract for the land at the time Meier's judgment was docketed in Marathon county; that such judgment, from that time, was a lien thereon; that plaintiff was not entitled to any relief against *Lemke;* that *Paff* was liable to account to plaintiff for the $500 received from *Lemke,* and was liable for costs; and that *Lemke* was entitled to costs against the plaintiff. Exceptions were filed sufficient to preserve for review the questions considered in the opinion. Judgment was entered according to the findings.

Plaintiff appealed from that part of the judgment decreeing *Lemke* a purchaser in good faith, without notice of Paulus' interest in the land, and from the judgment for costs in *Lemke's* favor. Defendant *Paff* appealed from the judgment against him for $500 and costs.

For the plaintiff there were separate briefs by *Brown & Pradt* and *Mylrea, Marchetti & Bird,* and oral argument by *Neal Brown.* To the point that the contract was enforceable though uncertain as to time, they cited *District No. 3 v. Macloon,* 4 Wis. 79; *Britton v. Erickson,* 80 id. 466, 468; *Kusel v. Watson,* L. R. 11 Ch. Div. 129.

For the defendants, the case was submitted on the briefs of *Silverthorn, Hurley, Ryan & Jones.* They contended that the contract for the sale of land was rendered so uncertain

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by its terms as to time of payment that it could not be enforced in equity by either party, or by a creditor of the purchaser, and that no title passed under it. *Williams v. Stewart*, 25 Minn. 516; *Nichols v. Williams*, 22 N. J. Eq. 63; *Potts v. Whitehead*, 20 id. 60; *Port Jervis, M. & N. T. R. Co. v. N. Y., L. E. & W. R. Co.* 10 N. Y. Supp. 852; *Burnett v. Kullak*, 76 Cal. 535; *Diamond State Iron Co. v. Todd*, 6 Del. Ch. 163.

The following opinion was filed November 24, 1896:

MARSHALL, J. The first question in order in the discussion of this case is, Was the contract between Jacob Paff, deceased, and Henry Paulus so far executed as to render it enforceable in equity?

It does not appear that there is any controversy respecting what the contract was in fact. The only objection raised to its enforcement appears to be that it was indefinite in respect to the time of payment for the land. The price per acre was agreed upon. The vendee was put in possession of the premises, and he continued in such possession from the making of the contract, in 1884 or 1885, down to the commencement of this action. In the meantime he made improvements and paid half the purchase money.

No time being specified for payment of the purchase money, it was payable on demand. Therefore there was no element of uncertainty in that. The rule is that part payment of the purchase money, and delivery of possession of one of the parcels of land included in the parol contract, are sufficient to enable the purchaser to enforce specific performance as to all the parcels. *Jones v. Pease*, 21 Wis. 645; *Dist. No. 3 v. Macloon*, 4 Wis. 79; *Brandeis v. Neustadtl*, 13 Wis. 142; *Docter v. Hellberg*, 65 Wis. 415. It follows that the conclusion of the trial court on this branch of the case cannot be disturbed.

Paulus being the equitable owner of the land, the judg-

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ment against him attached as a lien on such interest, good as against all persons except purchasers in good faith without notice, as soon as the same was docketed in Marathon county.

The trial court found that *Lemke* purchased and paid for the forty acres without notice that Paulus had any interest therein, and in good faith believing that the land belonged to Paff; therefore, that he took title thereto under the Paff deed, discharged from the lien of the judgment. The findings of fact, in that regard, appear to be sustained by the evidence. Therefore the conclusion of law based thereon followed as a matter of course.

The important question to be determined is whether Paff is responsible or not for the purchase money paid to him by *Lemke* and turned over to Paulus. So far, at least, as the purchase money had been paid to Paff on his contract with Paulus, he held the title to the land as trustee for those beneficially interested, first as trustee for Meier, who was entitled to first lien thereon under his judgment, then for Paulus, the equitable owner, subject to such judgment. *Winslow v. Crowell*, 32 Wis. 639; *Church v. Smith*, 39 Wis. 492. If actual notice of the existence of the judgment had been brought home to Paff prior to the conveyance to *Lemke*, the relation between him and the judgment creditor would have been precisely the same as in *Church v. Smith*, though created in a somewhat different manner. There this court held that the *cestui que trust* had such an interest in the land that he was entitled to come into a court of equity and enforce the execution of the trust.

Such is really the nature of this action as between plaintiff and Paff. It was to enforce a trust, or, if the trust could not be enforced, by reason of a violation of duty on the part of the trustee, then for damages for such violation, and it was and is governed by the law respecting that subject. The damages, if any, for which Paff was liable to plaintiff,

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representing the judgement creditor, grew out of some violation of duty on the part of the former which he owed to the latter. The transfer of the forty acres to *Lemke*, a *bona fide* purchaser for value without notice, and the payment of the consideration to Paff, were effectual to remove the lien of the judgment from that part of the land. The same act that removed the lien from the land transferred such lien to the fund in the hands of the trustee, under the general rule that no change in form of the trust property effected by the trustee will impede the rights of the beneficial owner to reach it and to compel its transfer, provided it can be identified as a distinct fund.

If the proceedings had been instituted against Paff to charge him as trustee, while he retained the fund in his hands, obviously he would have been liable to account for it; and if it were found that, with notice of the existence of the judgment, he parted with the fund, he would have been liable to respond in damages as for a breach of trust. 2 Pomeroy, Eq. Jur. § 1058; *Lathrop v. Bampton*, 31 Cal. 17; 2 Story, Eq. Jur. § 1232.

The difficulty in this case grows out of the fact that Paff did not know of the judgment lien when the transaction with *Lempke* took place. The judgment had been docketed, but that fact was not known to Paff, and the court expressly acquits him of participation in any fraudulent scheme to defeat the collection of the judgment; hence, there is no principle of law upon which he can be held liable in damages for a breach of trust, unless the law is that one so circumstanced is required, before paying the money received from the vendee to the equitable owner, to examine the records and to investigate respecting whether there is any lien upon the land or not.

No duty can exist without knowledge of the facts, or knowledge sufficient, at least, to put one on inquiry which will lead to a discovery of the facts, upon which such duty rests. The rule respecting the subject is laid down with clear-

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ness in Freeman, Judgments, § 349, as follows: "If the trustee sells and conveys the land clear of the lien, the proceeds of the sale, while in his hands, are subject to the lien; but he is not bound to search the records, and therefore is relieved from all liability if, without knowledge of the existence of any judgment on the property, he pays over the money without regard to such lien." This seems to accord with reason and common sense, when applied to the practical affairs of life. If such be not the law, then, as before stated in effect, no trustee of the title to land is safe in executing his trust by selling the interest of the *cestui que trust* by authority of the latter and parting with the proceeds for his benefit, without searching the records for information respecting any judgment lien that may rest on the equitable interest of the beneficial owner; and if he sells such interest, with or without notice of such judgment lien if one exists, he is liable to account to the judgment creditor, or to respond to him in damages, as for an abuse of trust.

We may safely venture the assertion that no authority can be found anywhere to charge a person as trustee of a fund after he has parted with it, or to hold him personally liable in damages for a breach of trust, without bringing home to him knowledge of the existence of the trust relation to which he is a party, before the alleged breach.

The question under consideration was expressly decided in *Cook v. Dillon*, 9 Iowa, 407, 74 Am. Dec. 354, in the following language, in substance: Money that comes into the hands of a trustee under such circumstances is subject to the lien of the judgment, and such lien is enforceable in equity; but, if the money is paid over without knowledge of the lien, the trustee will not have to account for it again, or to be under any liability therefor. It is not his duty to search and make inquiry respecting the existence of such lien, but it devolves upon the person holding the lien to give notice of and enforce it.

Applying the foregoing to this case, the judgment against

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Paff for $500, received from *Lemke* and paid over to Paulus in ignorance of the lien of the judgment, is inequitable, and opposed to well-established principles of law. The learned circuit judge fell into the error of holding that Paff committed a breach of duty which he owed to the judgment creditor, by assuming that the mere docketing of the judgment charged the former with notice of it. The docketing of a judgment is not notice, at common law, to anybody dealing with the judgment debtor (Kerr, Fraud & M. 267), and certainly it is not by any statute of this state. With that element out of the case, Paff stands entirely innocent of any wrong to the judgment creditor, Meier. The learned circuit judge so found, in the following words, which we quote from his opinion: "I acquit Mr. Paff of any fraudulent motive or intent, or of any design to assist Paulus in defrauding his creditors."

As it appears from the record that Paff made no defense in the court below to the enforcement of the contract between him and Paulus, so as to render the judgment an effectual lien upon the remaining land, the judgment against him for costs, as well as for the damages, must be reversed, and judgment be entered in the court below in his favor for costs.

By the Court.— On the appeal of *William A. Paff*, as executor, etc., the judgment of the court below, for $500 and costs, is reversed; and on the appeal of *G. D. Bartz*, receiver, the judgment of the court below in favor of *Herman Lemke* is affirmed. The cause is remanded, with directions to render judgment in accordance with this opinion, in favor of *William A. Paff*, as executor, against *G. D. Bartz*, receiver, for costs to be taxed according to law. Costs are awarded against the receiver, in this court, on both appeals.

CASSODAY, C. J. I concur in the reversal, but not in the reasons given therefor, or the mandate of the court. It

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appears from the findings of the trial court, in effect, that the judgment recovered against Paulus and docketed, as mentioned in the opinion filed, was for $2,521.45; that, prior to the commencement of this action, execution was issued thereon to the sheriff of Marathon county, and by him returned wholly unsatisfied; that the plaintiff was duly appointed receiver, and thereupon filed this creditors' bill; that, as early as 1885, Paulus entered upon the land in question, cut timber and firewood thereon, cleared three or four acres, built a fence around the clearing, built a small building on said land in which to stable his horses, and paid taxes on said land from year to year, as the same became due; that, prior to 1889, Paulus had paid to Paff, from time to time, the sum of $400 on the purchase price of the land, besides some interest; that July 27, 1889, Paulus sold ten acres of the land to one Zeich for $300, and, by agreement with Paulus, Paff deeded the ten acres to Zeich, and $70 of this purchase price was paid to Paff upon interest due upon the contract, and the remainder was used by Paulus to pay notes upon which Paff was an indorser, given in part for money used by Paulus in carrying on the Meier litigation, and was so known by Paff; that, when Paff conveyed the forty acres to *Lemke*, the said "*Lemke* paid to said Paff the sum of $500," as the purchase price thereof, "which money was by said Paff turned over to . . . Paulus;" that Paff then and there elected to hold the balance of the purchase money due him from Paulus against the remaining thirty acres of the land, instead of taking it out of the $500 so received by him from *Lemke;* that at that time there was due from Paulus to Paff, upon the purchase price of said land, only the sum of $400 and interest from June 14, 1889; that, from a time prior to the rendition of said judgment, Paulus was insolvent, and had no property, real or personal, out of which said judgment could be satisfied, except the interest he had in the lands mentioned, and that these facts

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were known to Paff, who knew of the existence of the suit by Meier against Paulus, and what it was for, and the rendition of the judgment therein, about the time it was entered, and had constructive notice of the docketing of said judgment in Marathon county at the date thereof.

Our statute declares that "every such judgment, when so docketed, shall, for a period expiring ten years from the date of the rendition thereof, be a lien on the real property in the county where the same is docketed, except the homestead," etc., of "every person against whom such judgment shall be rendered and docketed, and which he may have at the time of docketing thereof in the county in which such real estate is situated, or which he shall acquire at any time thereafter within said period of ten years." Sec. 2902, R. S.; *Moore v. Smead*, 89 Wis. 567. The statute also declares that "the word 'land' or 'lands,' and the words 'real estate' and 'real property,' shall be construed to include lands, tenements and hereditaments, *and all rights thereto, and interests therein.*" Subd. 9, sec. 4971, S. & B. Ann. Stats. The statute thus making the judgment a lien uses substantially the same language as the statute giving a mechanic's lien. Sec. 3314, R. S. Paulus, being thus in possession of the seventy acres at the time of the rendition and docketing of the judgment against him, and having previously made valuable improvements thereon and paid one half of the purchase price and interest, as mentioned, thereby became the legal owner of a substantial interest in the land, whereby he, or any one succeeding to his interest in the land, might have compelled Paff to specifically convey the remaining title upon payment of the unpaid purchase price. That such specific performance might have been enforced is conceded in the opinion filed, and authorities are there cited in support of the proposition. See, also, *McWhinne v. Martin*, 77 Wis. 182; *Wall v. M., St. P. & S. S. M. R. Co.* 86 Wis. 57, 58, and cases there cited. The reason for the rule is that

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by such possession, payment, and improvements, the contract ceased to be executory merely, and became so far executed as to operate as a fraud on the vendee to allow the vendor to repudiate the same, and hence he is estopped from doing so. *Id.*

The question recurs whether, under our statutes, the judgment so docketed became a lien upon such interest of Paulus in the land. The opinion filed seems to go upon the theory that the title to the land was wholly in Paff, who held the same in trust for Paulus and those rightfully claiming under him, and that Paulus had a mere equitable interest in the land, to which the judgment did not attach as a lien, and which could be enforced only against those having actual knowledge, not only of the existence of the judgment, but that it had been docketed.

Upon that theory, it is difficult to perceive why actual knowledge of the rendition of the judgment should be less potential *in equity* than actual knowledge of such docketing. While the relation of vendor and vendee may be as indicated where the contract is purely executory and no provision is made as to the time when the title shall pass, and hence where the vendor is actually or presumptively in the possession of the land, yet, in my judgment, it has no application to the facts found in the case at bar. 28 Am. & Eng. Ency. of Law, 105–122. As indicated, the principles of law governing this case are those applicable to a case where the vendee has for several years been in the actual possession, made valuable improvements, and paid a considerable portion of the purchase price. The rule is elementary that "If the vendee is in possession, he is treated as owner of the property. He may mortgage it, or create an easement upon it. The estates or rights thus created are complete as against himself, but are liable to be defeated by the assertion of the vendor's rights, if they have been infringed upon." 28 Am. & Eng. Ency. of Law, 122, and cases there cited.

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A learned author cited by my Brother MARSHALL in the opinion filed says: "We have already shown that the lien of a judgment attaches to the *real*, as contradistinguished from the *apparent*, interest of the judgment debtor. It follows from this rule that, upon the recovery and docketing of a judgment against a vendor *or a vendee*, the interest which may pass by any sale made to render such lien available will be governed, if the lien is against the vendee, by the proportion of the purchase money paid by him; and, if it is against a vendor who retains the legal title, by the proportion of the purchase money remaining unpaid. In other words, the purchaser under a lien against a vendee will be entitled to a conveyance from the vendor upon precisely the same terms which would have been open to the vendee under the contract, and a purchaser under a lien against a vendor will be compelled to make a conveyance to the vendee upon precisely the same terms upon which the vendor could have been compelled to convey. In all cases a purchaser at a sale under a judgment succeeds to the rights and responsibilities of the judgment debtor, and to no other." Freeman, Judgments, § 363, where numerous adjudications are cited in support of the propositions.

This court has repeatedly sanctioned the principles thus stated. *Van Camp v. Peerenboom*, 14 Wis. 65; *Bates v. Campbell*, 25 Wis. 613; *Coe v. Manseau*, 62 Wis. 81; *Lillie v. Dunbar*, 62 Wis. 198; *Galloway v. Hamilton*, 68 Wis. 651. See, also, *Noyes v. Hall*, 97 U. S. 34; *Floyd v. Harding*, 28 Grat. 401; *Jackson v. Scott*, 18 Johns. 94; *Jackson v. Parker*, 9 Cow. 73; *Rand v. Garner*, 75 Iowa, 311; *Pugh v. Good*, 3 Watts & S. 56; *S. C.* 37 Am. Dec. 534. Thus, in *Van Camp v. Peerenboom*, *supra*, it was held, in effect, that where a person, having a contract for the purchase of land under which he had gone into possession, conveyed the land by warranty deed, with covenant of seisin, his grantee acquired an interest in the land which was subject to the lien of a judgment

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against him, and to a sale on execution, even where such grantee had conveyed back to his grantor, who thereupon contracted to convey to the respondent. In that case Mr. Justice COLE said: "The statute made the judgment a charge upon the real estate belonging to Anselmas at the time of its rendition, and the words 'real estate' are very comprehensive, sufficiently so to include his interest acquired by the conveyance from the appellant." And he there cites cases from New York to the effect "that even possession of lands is an interest which may be sold on an execution against the possessor," and "also that a person in the possession of land under a contract for the purchase and sale of it had an interest therein which might be sold on execution," except where the statute otherwise enacted. In some of the cases cited, bare possession was held to constitute an interest in lands sufficient to sustain ejectment against a mere wrongdoer. In *Coe v. Manseau, supra*, it was held that "actual possession of the vendee under an unrecorded contract for the sale of land is sufficient to put all persons upon inquiry as to his rights, and they are chargeable with that knowledge of the vendor's title which they would have obtained by such inquiry." *Church v. Smith*, 39 Wis. 492, cited in the opinion filed, is not in conflict with, but supports, the views here expressed. It was there held, in effect, that the vendor in such contract "holds the legal title *as security for the unpaid purchase money*," and that, if he transfers to another the notes given for such unpaid purchase price, he still "holds the legal title in trust for the security of his assignee."

The judgment in the case at bar was, under our statute, a lien at law upon Paulus' interest and right to the seventy acres, subject only to the payment of the balance of the purchase money, which, as found, was less than $500. *Lemke*, as a *bona fide* purchaser, was held to have obtained title to the forty, relieved of the lien, because the possession of

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Paulus of that forty was not open and notorious. But neither Paulus nor Paff, nor both of them together, could diminish such interest and rights acquired by the plaintiff by virtue of such lien. When *Lemke* paid the $500 to Paff, as found by the trial court, it necessarily operated as full payment of all there was due to him from Paulus on the contract, and left the judgment a lien on the remaining thirty acres, free from any further claim on the part of Paff.

A motion by the plaintiff to correct the judgment so as to make the same payable out of the funds in the hands of *G. D. Bartz* as receiver was granted January 12, 1897.

A motion by the plaintiff for a rehearing was denied February 2, 1897.

THE LEVEL LAND COMPANY No. 8, Respondent, vs. HAYWARD and others, Appellants.

November 28, 1896 — February 2, 1897.

Corporation: Stock subscription.

A corporation, with the consent of one who had subscribed for a large number of shares of its stock, proceeded to sell out to other parties its entire authorized stock, not reserving the shares subscribed for by him, and received payment therefor. *Held* that, in an action between the corporation itself and such subscriber (creditors not being interested), it could not recover on his subscription.

APPEAL from a judgment of the superior court of Milwaukee county: R. N. AUSTIN, Judge. *Reversed.*

This is an action to recover an assessment of six per cent. upon eighty shares of stock of $100 each in the plaintiff corporation, for which the defendants, as copartners, subscribed.

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The answer alleged, in substance, that although the defendants subscribed in form for eighty shares of stock in the corporation, it was orally agreed at the time between themselves and the other subscribers that they should not be compelled to take the stock if other subscribers could be obtained, and that in fact other subscribers were obtained for the eighty shares, and that all the authorized stock of the corporation, to wit, 250 shares, was in fact subscribed and paid for by others, and stock certificates issued to such others; that the corporation had no stock left which could be issued to the defendants, even if they paid their subscription.

Upon the trial all evidence of the alleged parol agreement was excluded. Evidence was, however, admitted tending strongly to show that the corporation had sold its entire 250 shares of stock, including the eighty shares subscribed for by defendants, to others, and had received full pay therefor, and issued its certificates of full-paid stock to such other subscribers.

A verdict for the plaintiff for the amount of the assessment upon eighty shares of stock was directed, and from judgment thereon defendants appealed.

The case was submitted for the appellants on the brief of *C. J. Faber*, and for the respondent on that of *Elliott, Hickox & Groth*.

Counsel for the appellants contended that the corporation, by selling and receiving payment for its entire authorized stock, had deprived itself of power to issue any stock to the appellants, and had thereby released them from their subscription. Cook, Stock (3d ed.), §§ 292, 298; Morawetz, Priv. Corp. (2d ed.), § 761.

The following opinion was filed December 15, 1896:

WINSLOW, J. Doubtless the defendants' subscription for stock could not be varied or affected by the alleged parol

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agreement, but this was not really the important question in the case. The proof which was offered tended to show that after the defendants' subscription was received the corporation went on, and sold out its entire authorized stock to others, with the consent of the defendants, and received full pay therefor. If this was the fact, it is impossible to see how those other subscribers could now be deprived of their stock, either by the corporation or by the defendants. If they cannot be deprived of their stock, then certainly the defendants ought not to be compelled to pay for stock which cannot be issued without making an illegal overissue of stock. It clearly seems to us that, if the facts be as alleged, then the parties have, by their acts, effectually canceled and rescinded their original contract. *Perkins v. Union B. H. & E. Machine Co.* 12 Allen, 273.

Different questions might arise were the controversy one between creditors of the corporation and subscribers to stock, but in an action between the corporation itself and the subscribers the foregoing conclusion seems very clear.

By the Court.— Judgment reversed, and cause remanded for a new trial.

A motion for a rehearing was denied February 2, 1897.

THE WISCONSIN MARINE & FIRE INSURANCE COMPANY BANK, Appellant, vs. WILKIN and others, Respondents.

November 30, 1896 — February 2, 1897.

Guaranty, construction of: Joint liability.

Certain persons, all but two of them being stockholders in the W. Mfg. Co., signed an instrument which, after reciting that the W. Mfg. Co. was indebted to the W. M. & F. I. Co. Bank in a certain sum, and might thereafter become indebted in additional amounts,

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and expressing a consideration, proceeded as follows: "We and each of us do hereby agree upon demand to pay to said . . . bank all loans, drafts, overdrafts, indorsements, accounts, checks, notes, interest, demands, and liabilities, of every kind and description, now owing, or which may hereafter become due or owing, by said W. Mfg. Co. to said . . . bank. It is understood that we each waive notice. . . . This is a continuing guaranty. It is understood that we are to pay any sums which may accrue hereunder in the proportion which the amount of stock now held by each of us in said company bears to the whole amount of capital paid in by said company." In an action on such guaranty, *held*, that whatever might have been the intention of the signers, they had all of them in legal effect bound themselves jointly and severally to the bank for the entire indebtedness of the W. Mfg. Co., and not simply in severalty for an amount proportioned to the stock held by them; and that the latter clause could only have effect as fixing a rule of contribution among themselves.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Reversed.*

This is an action on a contract of guaranty, which is in the following words:

"WHEREAS, the Wilkin Manufacturing Company, of Milwaukee, is indebted to the *Wisconsin Marine & Fire Insurance Company Bank*, of Milwaukee, Wisconsin, in the sum of about $9,000 (nine thousand dollars);

"AND WHEREAS, the said company may hereafter become indebted to said bank for additional amounts;

"NOW, THEREFORE, in consideration of the premises, and of one dollar to each of us in hand paid, the receipt whereof is hereby acknowledged, we and each of us do hereby agree upon demand to pay, or cause to be paid, to said *Wisconsin Marine & Fire Insurance Company Bank*, all loans, drafts, overdrafts, indorsements, accounts, checks, notes, interest, demands, and liabilities, of every kind and description, now owing, or which may hereafter become due or owing, by said Wilkin Manufacturing Company to said *Wisconsin Marine & Fire Insurance Company Bank.*

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"It is understood that we each waive notice of demand and notice and protest of every kind, and agree that said bank may without notice grant extensions of time to said company, and may from time to time renew any obligations of said company. This is a continuing guaranty.

"It is understood that we are to pay any sums which may accrue hereunder in the proportion which the amount of stock now held by each of us in said company bears in the whole amount of capital paid in by said company.

"IN WITNESS WHEREOF, we have hereunto set our hands and seals, this ninth day of Jany., A. D. 1888."

The instrument was signed by all the defendants.

The answer of the defendants sets forth the amount of paid-up stock of each defendant in the Wilkin Manufacturing Company, and the total amount of paid-up stock of the company at the date of the execution of the contract. The defendants claimed that their liability to plaintiff was in the proportion which the amount of stock held by each, at the date of the contract, bore to the whole amount of capital paid in at that time. The trial court construed the contract in accordance with such contention, and found that defendants *Morris* and *Wilkin* were not the owners of stock at all; hence not liable on the contract.

The case was tried by the court. Appropriate exceptions were filed to raise the questions considered in the opinion. Judgment was rendered in accordance with the findings, against each defendant, for such proportion of the indebtedness of the Wilkin Manufacturing Company to the plaintiff as the amount of stock of such defendant in such company bore to the whole amount of its paid-up stock at the date of the contract. Plaintiff appealed from the judgment.

For the appellant there was a brief by *Miller, Noyes, Miller & Wahl*, attorneys, with *Fish & Cary*, of counsel, and oral argument by *John T. Fish* and *Geo. H. Noyes*.

For the respondents there were briefs by *Stark & Han-*

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son and *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *F. C. Winkler* and *Joshua Stark*. They contended that the guaranty was several and not joint, and that the instrument itself showed that to be the intention of the parties. *Farmers' L. & T. Co. v. Commercial Bank*, 15 Wis. 424; *Railroad Co. v. Railway Co.* 44 Ohio St. 287; *Higginson v. Weld*, 14 Gray, 165. In order to arrive at the meaning of a contract the court may look to the surrounding circumstances. *Nash v. Towne*, 5 Wall. 689; *U. S. v. Peck*, 102 U. S. 64; *Manchester P. Co. v. Moore*, 104 N. Y. 680; *Sigerson v. Cushing*, 14 Wis. 527; *Bedard v. Bonville*, 57 id. 270; *Meade v. Gilfoil*, 64 id. 18; *Beason v. Kurz*, 66 id. 448; *Stout v. Weaver*, 72 id. 148; *Lynch v. Henry*, 75 id. 631; *Lyman v. Babcock*, 40 id. 503. The whole contract should be considered. *Hosmer v. McDonald*, 80 Wis. 54; *Janesville Cotton Mills v. Ford*, 82 id. 416, 430; *Davis v. Belford*, 70 Mich. 121; *Gibbons v. Bente*, 51 Minn. 499.

The following opinion was filed December 15, 1896:

MARSHALL, J. This case turns on the construction of the contract of guaranty. The learned trial judge held that, by the terms of the contract, there was created a several, not a joint, liability; that each of the defendants who signed as guarantor became liable only for such portion of the indebtedness of the Wilkin Manufacturing Company as the amount of stock held by him in such company, at the date of the contract, bore to the whole amount of capital then paid in to said company. It is claimed on the part of plaintiff that the contract is a joint and several obligation; that each of the signers is liable to the plaintiff for the whole indebtedness of their principal; and that the last clause of the agreement, which the defendants contend limits the liability of each of the guarantors to the proportion of the debts of the manufacturing company which such guarantor's stock, at the date of the contract, bore to the total paid-up stock of the

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corporation, has no other effect than to furnish a rule for contribution between the several guarantors. Considerable evidence was received, under objection, respecting the transactions leading up to the signing of the contract, and numerous errors are assigned on the rulings of the court in that regard; but the view we take of the case renders it unnecessary to consider such alleged errors.

The rules that govern the judicial construction of contracts, rightly understood and properly applied, will leave no reasonable doubt respecting the legal effect of the one in question. It must be borne in mind that the office of judicial construction is not to make contracts or to reform them, but to determine what the parties contracted to do; not necessarily what they intended to agree to, but what, in a legal sense, they did agree to, as evidenced by the language they saw fit to use. If the meaning of the language is ambiguous, the construction may be aided by resort to proof of the situation of the parties, their acts, and of the subject matter. *Nilson v. Morse*, 52 Wis. 240; *Sigerson v. Cushing*, 14 Wis. 527. It is said that the intention of the parties is to be sought for in the instrument itself, and that particular words and sentences must be construed so as to subserve such intention (*Weiseger v. Wheeler*, 14 Wis. 101; *Johnson v. N. W. Nat. Ins. Co.* 39 Wis. 87); but that must be taken in connection with the proviso that no intention, however manifest, can be effectuated unless it is consistent with a meaning that may reasonably be attributed to the language of the contract. So, after all, judicial construction comes down to this: What did the parties mean by the language they used? *Weiseger v. Wheeler, supra; Johnson v. N. W. Nat. Ins. Co. supra; T. B. Scott L. Co. v. Hafner-Lothman Mfg. Co.* 91 Wis. 667; *Jacobs v. Spalding*, 71 Wis. 177; *Braun v. Wis. Rendering Co.* 92 Wis. 245; *Gibbons v. Grinsel*, 79 Wis. 365. Nevertheless, while what the parties themselves meant is a test, it is not the only test of what a con-

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tract is in legal effect, for there is a limit, as indicated, beyond which the courts cannot go in that regard, expressed by standard text writers, and substantially all judicial authority, in the language of Parsons on Contracts (volume 2, p. 494), as follows: "Courts cannot adopt a construction of any legal instrument which shall do violence to the rules of language or the rules of law." *Parkhurst v. Smith*, Willes, 332. "If we go beyond this," says Chief Baron EYRE, in *Gibson v. Minet*, 1 H. Bl. 569, "we no longer construe men's deeds, but we make deeds for them." In short, that meaning cannot be given to a contract which cannot be reasonably drawn from its language, for the purpose of carrying out the intention of the parties thereto, however clearly established. It follows from the foregoing that, if a contract is so worded that it cannot be construed so as to carry out fully the intention of the parties, a court of law is powerless to do more than to enforce it so far as possible, within the principles indicated. Stating the rule in the language of Parsons on Contracts (volume 2, p. 494): "The rules of judicial construction do not require that the court should always construe a contract to mean what the parties meant, but that it should give to the contract such construction as will bring it as near the actual meaning of the parties, as the words they saw fit to employ, when properly construed, and the rules of law, will permit." There is another familiar rule that should be observed in the construction of this contract. That is that effect should be given, if possible, to all its parts. To that end, no part of the agreement should be rejected as void for uncertainty, or otherwise, if it will admit of any reasonable construction so as to sustain it as an essential part of the contract.

It is only left in this case to apply the foregoing principles. The first clause of the agreement contains the following: "We and each of us do hereby agree upon demand to pay, or cause to be paid, to said *Wisconsin Marine & Fire*

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Insurance Company Bank, all loans . . . and liabilities, of every kind and description, now owing, or which may hereafter become due or owing, by said Wilkin Manufacturing Company to said *Wisconsin Marine & Fire Insurance Company Bank*." It cannot be, and is not, contended but that this language, by itself, constitutes a plain joint and several obligation. The rules for judicial construction cannot be properly resorted to, to vary or explain such language so as to mean anything else, for the words are not susceptible of any other meaning. The learned trial court, in effect, destroyed this plain agreement, by holding that it was controlled or modified by the last clause, providing that the signers should pay in the proportion which their several holdings of stock bore to the total paid-up stock of the company at the date of the contract. That, clearly, violated the rule that effect should be given, if possible, to every part of the contract, as it let out *Wilkin* and *Morris* entirely, they not being stockholders at the time of the execution of the agreement, notwithstanding they severally agreed to *pay all* the liabilities of their principal. It violated the rule that effect cannot be given to the intention of the parties which violates the rules of language. It destroyed the effect of the plain, absolute agreement for joint and several liability of the signers for *all the indebtedness*, made in the first part of the agreement. Looking to the steps which led up to the making of the contract, the court came to the conclusion that the parties intended to incur a several liability proportionate to their respective holdings of stock, as compared with the whole paid-up stock of the principal, and gave effect to that intention, by violating the rule that courts can only go to the extent of giving effect to the intention, so far as to bring the contract as near thereto as the language contained therein, when properly construed, and the rules of law will permit. Lastly, the court overlooked the rule that, when two clauses of a contract are in

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conflict, the first governs, rather than the last. *Green Bay & M. C. Co. v. Hewitt*, 55 Wis. 96; 2 Pars. Cont. 513; *Hartung v. Witte*, 59 Wis. 285, cited by appellant's counsel. This is based on a very long and well-established rule stated by Blackstone (in book 2, Comm. 381), thus: "If there be two clauses so totally repugnant that they cannot stand together, the first will be received, and the last rejected." To the same effect are Chitty, Cont. (11th Am. ed.), 128, and *Straus v. Wanamaker*, 175 Pa. St. 213. In the last citation, the contract contained a distinct guaranty of fifty per cent. profit on a transaction between the parties, followed by a clause the literal effect of which was to limit or partially destroy such guaranty. The court said: "The obvious method of construing such a contract is to hold that the parties clearly stated their purpose in the beginning."

The law is so well settled on the subject that it cannot be contended but that, if the last clause of the contract is so repugnant to the first that both cannot stand, the first must be taken as expressing the contract between the parties. But it is contended that a proviso merely limiting a previous clause of a contract, without destroying it, is not void, but must be considered as incorporated into and forming a part of the clause which it limits. On this, *Williams v. Hathaway*, 6 Ch. Div. 544, is cited, and to that may be added *Chase v. Bradley*, 26 Me. 538; *Jackson v. Ireland*, 3 Wend. 99; *Butterfield v. Cooper*, 6 Cow. 481. Indeed, that is elementary. Whart. Cont. § 673; 1 Addison, Cont. *186; Story, Cont. § 810. "But," says Judge Story, "if the subsequent stipulation of the contract should restrict what was distinctly stated and constitutes a principal inducement to the contract, it will be of no effect." That is really what is decided in *Williams v. Hathaway*, *supra*. "The distinction," says JESSEL, M. R., "has always been taken between a proviso which is repugnant to the covenant and therefore void, and a proviso which can be incorporated into the cove-

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nant and be consistent with it." He limits the rule that a proviso limiting a previous covenant may stand as an essential part of the contract, to such as may reasonably be considered as incorporated into and forming a part of the covenant, hence not repugnant to it. That is in perfect accord with the rule laid down by Judge Story, to the effect that "if the subsequent clause contradicts what was distinctly stated, and constitutes a principal part of the contract, it has no effect upon it." It is also in accord with the holdings of this court on the subject in *Green Bay & M. C. Co. v. Hewett*, 55 Wis. 96; *Hartung v. Witte*, 59 Wis. 289. Testing the contract in question by the rule last discussed, it is clearly apparent that the last clause cannot affect the obligation which precedes it. The words whereby each of the signers agreed to "*pay all of the liabilities*" of their principal are distinct and unmistakable. The effect which defendants claim for the last clause, and which the court gave to it, contradicts, restricts, and destroys the first provision entirely as to two of the signers; and it also entirely destroys such clause so far as it creates a joint and several liability for the whole indebtedness of the principal. That is not permissible according to any authority to which our attention has been called, or any which we have been able to discover.

As bearing on the question under discussion, counsel for defendants confidently cite *Gibbons v. Grinsel*, 79 Wis. 365, and other cases in this and other courts, involving the construction of subscription contracts for the payment of the cost of constructing creameries, each subscriber to have an interest in the property corresponding to the amount of his subscription. Those cases are plainly distinguishable from this. In *Gibbons v. Grinsel*, which is a fair type of all of them, the subscribers agreed to pay $6,000. It was provided that a corporation might be formed, and each take stock to the amount of his subscription, which should be the limit of

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his liability. Each "pledged himself to the performance of his part of the agreement." At the foot of the contract, each subscribed his name, placing the amount of his subscription opposite thereto. The court held that each subscriber only bound himself to pay the amount of his subscription, and that all in the aggregate bound themselves to pay the full amount of $6,000; that such was the manifest intention of the parties; and that it was consistent with the language used. By this construction, the agreement of all to pay $6,000 was merely explained, but not impaired, by the subsequent provisions. If the contracts in the creamery cases provided that the subscribers, and each of them, would *pay the full sum of $6,000*, obviously a very different question would have been presented, and a very different conclusion respecting the character of the contract might have been reached.

It follows from the foregoing that, whatever was the intention of the parties as shown by their acts preceding the signing of the contract, none other can be given effect to under the contract than that they jointly and severally bound themselves to the plaintiff for the entire indebtedness of the Wilkin Manufacturing Company to plaintiff, mentioned in the complaint. The language of the contract does not admit of any other reasonable construction without violating both the rules of language and of law. The foregoing does not necessarily require the rejection of any part of the contract. The effect of our reasoning is that the first paragraph of the agreement proper contains a joint and several agreement to pay the whole indebtedness of the Wilkin Manufacturing Company to the plaintiff, and that it must stand as expressing the agreement between plaintiff and defendants. The last clause, if intended to refer to the obligation which precedes it, so restricts and destroys it that it cannot be enforced as against the plaintiff, whatever the actual intention of the parties was. Such last clause, however, may be given the

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full effect that can be legitimately attributed to it as fixing a rule of contribution between the defendants. That will give to the agreement a construction as near the actual meaning of the parties as the language they used to express their intention, when properly construed, and the rules of law, will permit. The court cannot go further.

By the Court.— Judgment of the circuit court is reversed, and the cause remanded with directions to render judgment in accordance with this opinion.

A motion by the respondents for a modification of the mandate of this court, or for a rehearing, was denied, with costs, February 2, 1897, except that the mandate was modified so as to read as follows:

The judgment of the circuit court is reversed, and the cause is remanded with directions to enter judgment in accordance with this opinion, unless the trial court, upon notice and application, in its discretion and upon such reasonable terms as may be just and equitable, grants leave to the respondents *Mann* and *Munkwitz* to so amend their answers as to raise and present the issue of reformation of the contract on which the action is based.

IN RE STEINKE'S WILL.

December 16, 1896 — February 2, 1897.

Lost will: Presumption as to revocation: Declarations of testatrix.

On appeal to the circuit court from a decision of the county court refusing to admit to probate a will alleged to have been lost, the proponent produced evidence establishing the facts that the testatrix made a valid will, the contents of which were clearly proved, and left it with the notary who drew it; and that after her death it could not be found. The notary could not testify positively as

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to what had become of it, but thought the testatrix had taken and retained it. *Held*, that the presumption of revocation arising from her alleged possession of it and its disappearance was rebutted by evidence of frequent declarations by the testatrix, up to within three days of her death, that it was still in existence, unchanged, and in the possession of such notary, and that the will was properly admitted to probate.

APPEAL from a judgment of the circuit court for Milwaukee county: CHAS. V. BARDEEN, Judge. *Affirmed.*

Appeal from a judgment of the circuit court, establishing and admitting to probate an alleged lost will of Marie Steinke, deceased.

Louise Strehlow presented a petition to the county court of Milwaukee county, stating, in substance, the death of said Marie Steinke on the 28th of October, 1893, having previously made and executed her last will and testament, in which Frank Mueller was named as the executor, said deceased being at the time of her death an inhabitant of Milwaukee county; that her heirs at law were the said *Louise Strehlow*, and John Steinke, and two children therein named of Johanna Tietje, a deceased daughter of the said deceased; that, about one year previous to her death, the said Marie Steinke made and executed her will, and deposited the same for safe keeping with one Charles Holzhauer, and, after the death of her said mother, she went to his office to obtain the will from him, so as to propound the same for probate, but was informed that the will was not in his custody, and that the testatrix, Marie Steinke, had called for and taken it away, and never returned it to him, whereupon she made a thorough inspection of and search among the title papers of said Marie Steinke, but the said will could not be found, and had evidently been misplaced, and was lost.

She stated the provisions of the will in substance: That (1) she gave and devised the west thirty feet of lot 3, block

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225, Brown's addition, Ninth ward, city of Milwaukee, to the petitioner, *Louise Strehlow;* second, she gave and devised to her son, John Steinke, the east ten feet of lot 3, and west twenty feet of lot 4, block 225, in said Brown's addition; third, she gave and bequeathed to each of her said grandchildren the sum of $200, to be paid by *Louise Strehlow*, with interest at six per cent.; fourth, she named Frank Mueller as her executor.

A hearing was had upon said petition, Franklin A. Becher having been appointed guardian *ad litem* of the minors interested in the proceeding. The county court refused to admit said alleged will to probate, and the petitioner, *Louise Strehlow*, appealed from such determination to the circuit court for Milwaukee county, where, after a trial and hearing, said will was allowed and established as a lost will, in substance as stated in said petition, and also as bequeathing to her said daughter, *Louise Strehlow*, and her son, John Steinke, her "few personal household articles of furniture."

The minor grandchildren, by their guardian *ad litem*, appealed from the judgment of the circuit court. The finding of the trial judge purports to set forth at length the substance of the evidence in the circuit court, and finds that the appellant and respondents, by their counsel, having admitted that the several bequests and dispositions of her estate by deceased were correct, and as stated by the witnesses, the only issue of fact to be found is, Was the will of Marie Steinke, deceased, in existence at the time of her death, and did she die believing it was in the care and custody of Charles Holzhauer, with whom it was placed? that the said will was duly executed in February, 1893, and delivered to the care of the custodian, at her request; that she did not have access thereto, and at the time of her death she fully believed her last will and testament was in existence, and in the care and custody of the person to whom she had so intrusted it; that she intended to dispose of her whole

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estate by will, and died believing she had done so; and that there was no evidence to show that she had received the will again, or had destroyed it or authorized its destruction, or had taken it out of the possession of the person who had so received it.

For the appellants there was a brief by *F. A. Becher, in pro. per.*, and *Dahlberg & Becher*, attorneys, and oral argument by *S. W. Dahlberg*. They argued that the burden of proof was upon the proponent to establish that the will was lost or accidentally destroyed. The presumption is that, if it cannot be found, it has been revoked, and that presumption can be overcome only by positive proof. *Jamison v. Snyder*, 79 Wis. 286; Cassoday, Wills, § 356; Thornton, Lost Wills, § 56; *Schultz v. Schultz*, 35 N. Y. 653; *Betts v. Jackson*, 6 Wend. 173; *Idley v. Bowen*, 11 id. 227.

For the respondent there was a brief by *Keefe & Brand*, and oral argument by *J. C. Keefe*.

PINNEY, J. The evidence clearly shows that the deceased, early in 1893, duly made and executed her last will and testament, disposing of all her property in the manner and to the persons stated in the judgment of the circuit court, and that she delivered it for safe keeping into the hands of Mr. Holzhauer, the notary who drew it. She died October 28, 1893, and the evidence shows in the full belief that her said will still remained in the hands and safe keeping of Holzhauer. Two days after the death of the testatrix, application having been made by *Mrs. Strehlow*, one of the devisees, he was unable to find it in his safe, where he kept divers wills which he had drawn, or elsewhere.

He testified that he was under the impression that she had called for it, and that he had let her take it, and he so testified, in substance, in the county court. But on the trial in the circuit court he was unable to say with any certainty that he had so delivered it, or to remember that he had ever

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parted with it to any one. At one time it appears that he thought he might have delivered it to the county judge, after the death of the testatrix, and inquired at his office for it, and had made thorough search for it, but without avail. He further testified that, after the will was made, he could not remember what was done with it; that he remembered of having the will in his possession since that time, in his safe, but did not know what had happened to it; that he remembered that *Mrs. Strehlow* came to him, after the death of the testatrix, and asked for it; that he searched for the will, and did not know where it was; that no one could have taken it out of his safe without his knowledge or consent; that the testatrix called at his office as many as three or four times for the will, and he had loaned it to her, or let her take it, and that he could not tell how long she had kept it on such occasions before returning it; that he did not remember when she got it the last time, or that she returned it; that, if she returned it, he would have had it in his safe at the time of her death; that she did not send any one to him to get it; and that he knew she did not return it the last time she got it, and that he had not got it; that, at the last time she called on him, she was weak, and walked with difficulty.

His testimony on the subject is quite unsatisfactory. The testatrix was a person considerably advanced in years, and her last illness was of brief duration. About three days before her death, it appears that she told her daughter, *Mrs. Strehlow*, that she had not made any change in her will; that it should remain as she had made it, and "that Mr. Holzhauer has the will." Mrs. Otto testified that, on the Tuesday before she was taken sick, the testatrix stated to her how she had disposed of her property, and that "the will was at Holzhauer's;" and it was shown that three days before her death she made substantially the same statement to Ida Weisenberg; that she had frequently spoken to her about

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the will, and on each occasion had said that the will "was over to Holzhauer's," and on the evening of that day she made the same statement, in substance, to Sophia Wichmann. Mrs. Lempke testified that the testatrix, then being quite weak, told her, three days before her death, that, if she "could get up again, she would go to Holzhauer's, and have her will qualified or destroyed or changed," and told her that the will was at Holzhauer's. After her death, it could not be found with her papers or effects.

The evidence, as to her clear and repeated declarations, satisfactorily shows that she believed from a period of time when she became unable to go and get it, up to the time of her death, that Holzhauer still had and held her will. If it satisfactorily appeared that Holzhauer returned the will to her, and it was last known to be in her possession, and after her death could not be found, a *prima facie* presumption would arise that she had destroyed it, with the intention of revoking it,—a presumption subject to be rebutted by competent evidence. Her declarations upon the subject of the existence or nonexistence of the will and its custody, up to or within a short time previous to her death, are competent evidence to rebut such presumption, and to show that she died in the belief that the will was still in existence as a valid disposition of her estate.

This subject is fully considered in *In re Valentine's Will*, 93 Wis. 45, where the authorities on this subject are collated and cited by CASSODAY, C. J., and the point vital on this appeal is expressly ruled.

If Holzhauer delivered to her the will and she failed to return it, we think that the evidence is sufficient to rebut any presumption of revocation by its destruction by the testatrix or by her authority. If he is mistaken in this respect and the will was left with him, then, and in any view that may be taken of the evidence, it was properly regarded as a lost will and established as such, and the judgment of the

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circuit court that it be allowed and admitted to probate in the county court, as provided by law, is correct, and should be affirmed.

By the Court.— The judgment of the circuit court is affirmed.

BUMBALEK and another, Plaintiffs in error, vs. PEEHL and another, Defendants in error.

December 18, 1896 — February 2, 1897.

Writ of error: Limitation of appeals.

The provision of ch. 215, Laws of 1895, prohibiting appeals to the supreme court from judgments in which the amount involved, exclusive of costs, is less than $100, unless the judge of the trial court shall certify that certain material questions, therein specified, are involved, does not apply to writs of error.

ERROR to review a judgment of the superior court of Milwaukee county: R. N. AUSTIN, Judge. *Affirmed.*

The case is sufficiently stated in the opinion.

F. J. Lenicheck, for the plaintiffs in error.

For the defendants in error the case was submitted on the brief of *Sylvester, Scheiber, Riley & Orth.*

CASSODAY, C. J. This action is to recover for an alleged instalment of rent, commenced in justice's court, and from the judgment rendered therein the case was taken by appeal to the superior court of Milwaukee county, where the case was retried. At the close of the plaintiffs' testimony the court directed a verdict in favor of *Peehl* and wife for $43.15, and to reverse the judgment entered thereon the *Bumbaleks* sued out this writ of error.

The defendants in error have moved to dismiss the writ, as being prohibited by ch. 215, Laws of 1895. Since that

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chapter only relates to appeals, and not to writs of error, it is manifest that the case at bar does not come within its prohibition. True, the word appeal is sometimes used broadly to denote the general nature of appellate jurisdiction, and in that sense may include a writ of error, and so a writ of error may, in such broad sense, include an appeal. But the one had its origin in the civil law, and the other in the common law. *Wiscart v. Dauchy*, 3 Dall. 327. The distinction between them has generally been maintained in practice, and is expressly recognized by our statutes.

Whether a writ of error will lie in a case like this was not argued by counsel, and is not here determined. While our constitution prevents the legislature from prohibiting writs of error, yet that provision did not enlarge the scope of the writ as it existed when the constitution was adopted, nor prevent the legislature from making reasonable regulations in respect to its use. Const. Wis. art. I, sec. 21; *Jackson v. State*, 81 Wis. 131, and cases there cited; *Smith v. Packard*, 12 Wis. 371; *Lombard v. Cowham*, 34 Wis. 300; *Crocker v. State*, 60 Wis. 553, and cases there cited; *State ex rel. Larkin v. Ryan*, 70 Wis. 683. For the purposes of this case, we assume that the writ of error properly brought the record before us for consideration, and hence deny the motion to dismiss the writ.

The bill of exceptions is not certified to contain all the evidence. It does state that the defendants offered no evidence. The only exception in the record is to the direction of a verdict in favor of the plaintiffs. Upon this record we cannot say that such direction was error. On the other hand, such direction of the verdict seems to have been correct.

By the Court.— The judgment of the superior court of Milwaukee county is affirmed.

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MILWAUKEE MASONS & BUILDERS' ASSOCIATION, Appellant, vs. NIEZEROWSKI, Respondent.

December 19, 1896 — February 2, 1897.

Combination in restraint of business: Monopolies: Contract against public policy: Consideration of note: Entry of judgment: Costs.

1. A combination by an association of masons and building contractors, embracing more than four fifths of those classes in a city, to suppress fair and free competition in bidding for contracts, evidenced by private by-laws requiring every member to submit all bids proposed to be made by him to such association, and if found to be the lowest bidder and entitled to the contract, to add to such bid, before submitting it to the owner or architect of the proposed building, six per cent. of the contract price, which he is to pay to the association, and give it his note therefor, and in that manner to exact from owners six per cent. in excess of a fair price, is contrary to public policy, unlawful, and void.
2. A note given to such association by a member thereof for the percentage required by such a by-law to be paid on a contract taken is founded upon an unlawful consideration, and is therefore void and will not be enforced.
3. It is the evident intent of our statute (S. & B. Ann. Stats. sec. 2894*a*) that the attorney for the party in whose favor a verdict is rendered shall prepare and deliver to the clerk the proper judgment to be entered thereon, and the clerk is required to tax the costs on the application of such party and insert them in the judgment, upon three days' notice to the other party. If the prevailing party fails thus to perfect his judgment within sixty days after the verdict, or, in case of a stay, within thirty days after the stay expires, he loses his right to costs, and the clerk must enter the proper judgment without costs. The mere pendency of a motion for a new trial does not operate as a stay of proceedings.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed, except as to costs.*

This action was brought to recover the sum of $2,289 claimed as a balance due upon a promissory note for $4,266, given by the defendant to the plaintiff corporation by the

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name and style of the *Masons & Builders' Association*, payable one year and three months after date. The defense was that the note was without legal consideration, and void; that the pretended consideration was contrary to public policy and good morals, and that the note was given by and secured from the defendant, who was a member of the said association, pursuant to a secret combination and confederation of the plaintiff and its members to exact of and from citizens of Milwaukee, Wisconsin, desiring to erect and construct buildings, a sum equal to six per cent. in excess of the actual cost and value of the work to be done, and by secret means to prevent and suppress competition in bidding for such work; that the note in question was given and received for the purpose and as a means of carrying into effect such alleged unlawful combination. There was practically no dispute as to the facts, and at the close of the evidence the court directed a verdict for the defendant. From a judgment thereon against the plaintiff for costs, plaintiff appealed.

At the time the note was given, the membership of the corporation plaintiff comprised about sixty of the seventy or seventy-five mason contractors in Milwaukee. The masons and builders thinking that they were not receiving fair treatment in the matter of bids for and letting work from owners and their architects, the association devised and adopted certain rules and by-laws in relation to bids and contracts, as a protection against the practices of which they complained. The association had two sets of by-laws, one of which was for general distribution, and the other, under which they carried on their operations, was private. They had contracts with material men in the city by which members who complied with the private by-laws could and did, notably in purchases of brick of the Brickmakers' Association, receive rebates of thirty-three and one-third per cent. upon all material necessary for their contracts, and they

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were thus enabled to underbid nonmembers for doing such work.

By reason of the city ordinances, all buildings within fire limits were required to be constructed of brick, stone, or other fireproof material, and by the plaintiff's private by-laws, if brick was purchased in Chicago, or outside of Milwaukee, where it could be procured much cheaper than of the Brickmakers' Association, the members of the plaintiff association were required to charge $2 more per thousand for laying them, $1.25 of which went to the Brickmakers' Association of Milwaukee, and seventy-five cents to the plaintiff association; which it was contended enabled the Brickmakers' Association to maintain general high prices, and to make such discount to members of the plaintiff association. By the private by-laws of the plaintiff it was required of all its members who wished to compete for any contract or job, public or private, to bring their bids to the rooms of the association the day preceding the one on which bids were to be submitted to the person desiring to build, or his architect or agent, when a committee of such bidders was appointed by a chairman, one of their number, who was to inspect the bids and determine who was the lowest bidder. Such lowest bidder was then *required to add six per cent.* to the amount of his bid, before he could submit it to the person for whose work he was competing, or to his architect or agent. In case his bid was eight per cent. or more lower than the next lowest bid, the bidders present were to determine how much should be added, over said six per cent., to his bid. All bids made by members were to be made at the rooms of the association, and at no other place; and after bids had been submitted to the owner or architect no member was allowed to change his bid, or do the work except at the figures given in such bid. Members who did not comply with the rules in submitting their bids to the association were "under no circumstances to submit a bid for the work."

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Another private rule was that "no member shall give a bid to any owner or architect for changes or additions to work under contract. The original contractor shall have the right to bid on such changes or additions *without competition*, unless the amount is larger than the contract; but other bidders shall go in *for the accommodation* of the owner, *after arranging the same* with the original contractor, who will pay only six per cent. of such work; the other bidders *having no voice* in making such bid." The successful bidder, upon signing a contract, was required to report to the association certain particulars thereof, and file the contract with the secretary within three days thereafter. Another of said rules required him to pay six per cent. of each estimate to the secretary; and when the roof was on the building he was to pay his percentage in full, whether he had received payment in full or not. Members were subject to certain fines for noncompliance with by-laws.

In the summer of 1892, and while a member of the association plaintiff, the defendant became the successful bidder for building the Gesu Church in Milwaukee, for the sum of $71,000, but he submitted his bid for doing the work directly to the congregation, and did not submit it to the association plaintiff, and there was no addition of six per cent. made to his bid for its benefit. The association claimed that the defendant should give his note for the usual percentage of six per cent., and, after he had been visited by a committee, he was notified to attend a special meeting to consider the subject, when, after some discussion, he finally gave the note in question for the required amount, it being understood that he would remain a member.

He testified, in substance, that he had other contracts, and he apprehended that if he did not give the note the association might cut him off, and he would have trouble in relation to his work; that he understood, if he did give it, he would have the benefit of the association in rebates. He also tes-

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tified that he had rebates on material for the church work, but that he got them by reason of prompt payment, and not through the association. The ordinary method of getting rebates was by obtaining a slip for that purpose from the secretary, but the evidence showed also that they were frequently arranged between the material men and members. The evidence showed that the only consideration for the note was the benefits and advantages received by the defendant, or expected to be, such as were provided and secured by said by-laws and the methods of transacting business under them.

For the appellant there were briefs by *A. J. Eimermann* and *Hoyt, Ogden & Olwell*, and oral argument by *F. M. Hoyt*. They argued, *inter alia*, that to make the plaintiff association an unlawful combination there must be proof that it was organized for the purpose of exacting a higher and greater sum out of the building public, and also that such combination was complete, so that the public was at the mercy of the members thereof. *Kellogg v. Larkin*, 3 Pin. 123, 131; *Laubenheimer v. Mann*, 17 Wis. 542; *National Ben. Co. v. Union Hospital Co.* 11 L. R. A. 437; *Richardson v. Buhl*, 6 id. 457. It must also appear that the public has suffered by reason of the combination. *Leslie v. Lorillard*, 1 L. R. A. 456; *Diamond Match Co. v. Roeber*, 106 N. Y. 473; *Horner v. Graves*, 7 Bing. 735; *People v. North River S. R. Co.* 2 L. R. A. 39. The defendant could not attack the note, even if the contract was unlawful. *National Distilling Co. v. Cream City Imp. Co.* 86 Wis. 352.

For the respondent there was a brief by *Austin & Fehr*, and oral argument by *W. H. Austin*.

PINNEY, J. 1. The question to be determined is whether the benefits and advantages which the defendant was entitled to receive, as a member of the association, in consequence

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of conducting its business under and in pursuance of the by-laws already noticed, constitute a lawful consideration for the note. The manifest purpose of the private by-laws was, by means of the combination thus effected, to suppress fair and free competition in bidding for building contracts in Milwaukee, and by such combination and method of bidding, upon its face apparently fair and free from objection, but in fact unfair and delusive, to compel owners to pay for the erection of buildings the sum of six per cent. in excess of what they would be otherwise obliged to pay for them if fairly let to the lowest bidder, uninfluenced by such combination. It seems to us that the restraint put upon the rights of proprietors by the provisions of these by-laws or rules, as well as the entire scheme thus disclosed, is contrary to public policy, and therefore void. Agreements in restraint of trade are against public policy and void, unless founded upon a valuable consideration, and limited as regards time, space, and the extent of the trade, to what is reasonable under the circumstances of the case. All such arrangements tend to deprive the public of the services of parties in the employments and capacities in which they are most useful, and they tend to expose the public to the evils of monopoly. *Richards v. American D. & S. Co.* 87 Wis. 512, and cases cited. In *Leather Cloth Co. v. Lorsont*, L. R. 9 Eq. 345, it was said: "All restraints upon trade are bad, as being in violation of public policy, unless they are actually, and not unreasonably, for the protection of parties dealing legally with some subject matter of contract." The test whether the restraint is reasonable is laid down in *Horner v. Graves*, 7 Bing. 735, 743, where it is said: "The question is whether the restraint is such only as to afford a *fair protection* to the interests of the party in favor of whom it is given, and *not so large as to interfere with the interests of the public.* Whatever restraint is larger than the necessary protection of the

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party can be of no benefit to either. It can only be oppressive; and, if oppressive, it is, in the eye of the law, unreasonable."

The combination in question is contrary to public policy, and strikes at the interests of those of the public desiring to build, and between whom and the association or the members thereof, there exist no contract relations; and it is not distinguishable in principle from the case of *Hilton v. Eckersley*, 6 El. & Bl. 47, 64, 65. While all reasonable stipulations and means to protect labor or trade are laudable, we must hold that the means here sought to be employed are such as the law will not sanction. We must consider what may be done under such an agreement, and the result which it will necessarily produce. As already pointed out, the operation of this combination, under its private by-laws, is to suppress free and fair competition in bidding for contracts, and by delusive and deceptive means members of the association are enabled to exact from owners a higher price for buildings than they would otherwise have to pay. In the matter of changes or additional work, *all* competition by other members of the association is prohibited, unless the amount exceeds the original contract price. And as the membership of the association embraces nearly six sevenths of the mason builders in Milwaukee, the combination not only tends to suppress competition, but operates most unjustly towards builders not members of the association. The restraint thus imposed on the trade is neither fair nor reasonable.

In *People v. North River S. R. Co.* 2 L. R. A. 33, 40, it was said that "all the cases, ancient and modern, agree that a combination, the tendency of which is to prevent general competition, and to control prices, is detrimental to the public, and consequently unlawful;" and many cases are there cited, and in the note, to the same effect.

In *Hooker v. Vandewater*, 4 Denio, 349, it was held that

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an agreement between the proprietors of five lines of boats engaged in the business of forwarders on the Erie and Oswego canals, to run for the remainder of the season at certain rates for freight and passage then agreed on, and to divide the net earnings among themselves in certain proportions, was a conspiracy to commit an act injurious to trade, and consequently void. The object expressed in the agreement was the "establishing and maintaining fair and uniform rates of freight, and equalizing the business among themselves, and to avoid all unnecessary expense in doing the same." Of this, JEWETT, J., observed: "The object of the agreement, as expressed in the written contract, was plausible enough, but it was impossible to conceal the real intention." He added that "the great, if not the sole, object of the agreement was to destroy rivalry, and keep up the prices to certain rates fixed by themselves." *Stanton v. Allen*, 5 Denio, 434, was a very similar case, where it was held the agreement was void at common law, as contravening public policy and injurious to the interests of the state. *Morris Run C. Co. v. Barclay C. Co.* 68 Pa. St. 186; *Central Ohio S. Co. v. Guthrie*, 35 Ohio St. 672; *Craft v. McConoughy*, 79 Ill. 346; *More v. Bennett*, 15 L. R. A. 321, 140 Ill. 69; *Texas Standard Oil Co. v. Adoue*, 15 L. R. A. 598, 602, 603, 83 Tex. 650; *Anderson v. Jett*, 6 L. R. A. 390, 89 Ky. 375. These are all cases quite in point, and show that the restraint on trade produced by this combination is unreasonable, and without legal sanction.

The true test of the illegality of a combination to restrain business or trade is its effect upon the public interests; that is to say, of those outside of the combination. *Nester v. Continental B. Co.* 161 Pa. St. 473. In *Atcheson v. Mallon*, 43 N. Y. 147, 149, it was said that "The true inquiry is, Is it the natural tendency of such an agreement to injuriously influence the public interests? The rule is that agreements which, in their necessary operation upon the action of the

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parties to them, tend to restrain their natural rivalry and competition, and thus to result in the disadvantage of the public, or of third parties, are against the principles of sound public policy, and are void." If, from the plaintiff's own showing or otherwise, a cause of action appears to arise *ex turpi causa*, the court will not allow a recovery. The maxim is *Ex dolo malo actio non oritur*. The defendant may properly invoke the maxim that in such cases *potior est conditio defendentis*. The court refuses to interfere in such cases, not on account of the defendant, but in the larger interests of the public. *Nester v. Continental B. Co. supra; Hooker v. Vandewater*, 4 Denio, 352. In *Wight v. Rindskopf*, 43 Wis. 348, it was said by RYAN, C. J., that "Courts owe it to the public justice, and to their own integrity, to refuse to become parties to contracts essentially violating morality or public policy, by entertaining actions upon them. It is judicial duty always to turn a suitor upon such a contract out of court, whenever and however the contract is made to appear." No court will enforce such an agreement as the one before us, or compel the defendant to go any further in performing on his part by enforcing payment of the note. The verdict for the defendant was rightly directed.

2. The verdict was entered November 25, 1895, and on November 30 a motion to set it aside and for a new trial was made, and denied by an order dated the same day the verdict was entered, but filed November 30. On the 9th of December the defendant procured his costs to be taxed at $50.73. No order or direction had been made by the court staying proceedings, or reserving the case for further consideration. On the 31st of January, 1896, the judgment was filed and entered, signed by the clerk of the court, and the costs, as theretofore taxed, are entered therein. The plaintiff afterwards moved to strike the entry of costs out of the judgment, for the reason that the defendant had

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failed and neglected to perfect his judgment within sixty days from the entry of the verdict, as provided by S. & B. Ann. Stats. sec. 2894*a*, which makes it the duty of the successful party "to enter and perfect the judgment upon the finding or verdict within sixty days after the filing of the finding, or the rendition of the verdict;" and that, "in case the successful party shall neglect to perfect the judgment within the time aforesaid, it shall be the duty of the clerk of the court to prepare and enter the judgment, but without costs to either party; and the neglect or failure of the successful party to enter and perfect judgment, as hereinbefore required, shall be deemed a waiver of his right to the accrued costs in the action," provided that whenever there shall be a stay of proceedings after finding or verdict, judgment may be perfected, as therein provided, "at any time after thirty days from the expiration of such stay of proceedings." The giving notice or entry of the motion for a new trial did not operate to stay the entry of judgment, or as a stay of proceedings.

The statute provides that upon receiving and entering a verdict, "if a different direction be not given by the court, the clerk must enter judgment in conformity with the verdict." R. S. sec. 2861; *Davison v. Brown*, 93 Wis. 85; *Wheeler v. Russell*, 93 Wis. 135. The clerk *must* enter judgment, but as provided by sec. 2927. "The judgment shall be entered in the judgment book." Sec. 2897. By sec. 2927, S. & B. Ann. Stats., "the clerk shall tax and insert in the entry of judgment, and in the docket thereof, if the same shall have been docketed, *on the application* of the prevailing party, upon *three days' notice* to the other, the sum of the costs and disbursements as above provided." If the successful party "shall neglect to *perfect* the judgment" within sixty days, as specified, then "it shall be the duty of the clerk of the court to *prepare and enter* the proper judgment, but without costs to either party." S. & B. Ann. Stats.

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sec. 2894*a*. No judgment appears to have been prepared by the successful party within the prescribed sixty days, although the costs were taxed within that time. It is the evident intention of the statute that the attorney of the party in whose favor a verdict is rendered shall prepare and deliver to the clerk the proper judgment to be entered thereon, and the clerk is required to tax the costs on the application of such party, and insert in the entry of judgment the sum of the costs and disbursements, upon three days' notice to the other party. When this has been done, the prevailing party has *perfected* his judgment, within the meaning of sec. 2894*a*. The defendant did not *perfect* his judgment within sixty days after the entry of the verdict, and, as no different direction was given by the court, under sec. 2861, at the expiration of that time the defendant lost his right to costs, and it became "the duty of the clerk to *prepare and enter* the proper judgment, but without costs to either party." Sec. 2894*a*. It is to be noted that by sec. 2861, "upon receiving a verdict, the clerk shall make an entry on his minutes specifying . . . the verdict, and either the judgment rendered thereon, or *an order* that the cause be reserved for argument or further consideration." The case of *Steinhofel v. C., M. & St. P. R. Co.* 92 Wis. 123, was decided in view of a very general practice that had grown up to regard the entry of a motion for a new trial as a stay of proceedings until disposed of, and our attention was not directed to sec. 2861. Correct practice and a proper application of the statute compel a contrary conclusion. *Davison v. Brown* and *Wheeler v. Russell, supra.* For these reasons we must hold that in this case the defendant, by failing to perfect judgment within sixty days after the entry of the verdict, lost his right to costs, and that the judgment, as to costs, must be reversed, and in all other respects affirmed, but without costs; the fees of the clerk of this court to be paid by the defendant.

By the Court.— Judgment is ordered accordingly.

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GROTH and another, Respondents, vs. CENTRAL VEREIN DER GEGENSEITIGEN UNTERSTUETZUNGS GESELLSCHAFT GERMANIA, Appellant.

December 21, 1896 — February 2, 1897.

Benefit society: Change of beneficiary: Corporation: Life insurance.

1. A corporation, organized under sec. 1771, S. & B. Ann. Stats., for the purpose, as expressed in its articles of incorporation, of "mutual aid in case of sickness, accident, and death of its members, or their families, . . . without capital stock, and organized solely for benevolent and charitable purposes, and no dividend or pecuniary profits shall ever be made or declared;" and by its constitution declaring its object to be "to associate all male persons of good character who are sociably acceptable, and to the best of its ability provide their relatives with material and moral aid; to establish a relief fund for the benefit of its sick members; to establish a fund out of which there shall be paid, upon sufficient proof of the death of a member in good standing, . . . a sum of not exceeding $2,000 to the heirs as directed by the member," has no authority, either under the statute, or under its articles of incorporation or its constitution, to issue a benefit certificate payable to a person who is neither of kindred to nor a member of the family of the member to whom it is issued.
2. An attempt by a member of such a society, to whom a certificate had been issued in favor of his parents, to substitute as beneficiaries strangers to whom he was indebted for care in sickness, but who were not of kindred to him or members of his family, being contrary to the statute and to the articles of incorporation of such society, was null and void, and constituted no consideration for the surrender of such certificate, nor did the surrender and cancellation thereof relieve the society from liability to the parents.

APPEAL from a judgment of the superior court of Milwaukee county: R. N. AUSTIN, Judge. *Affirmed.*

The case is sufficiently stated in the opinion.

For the appellant there were briefs by *Fiebing & Killilea*, and oral argument by *O. J. Fiebing*. They argued that the intention of the deceased member as to who should be beneficiary ought to govern; that the promise to pay to the person designated in the first certificate was conditioned

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that the member had not otherwise disposed thereof, and that in this case he had disposed of it and received another, and that, in such a case, the beneficiary had no interest, and no standing to contest the validity of the change. If such change was ineffectual, there was no person entitled to the benefit, and it lapsed to the society. Niblack, Ben. Soc. & Acc. Ins. 32, 272, 340, 412, 418; *Martin v. Stubbings*, 126 Ill. 387; *Clark v. Durand*, 12 Wis. 223, 233; *Hellenberg v. Dist. No. 1 I. O. B. B.* 94 N. Y. 580, 585; *Ballou v. Gile*, 50 Wis. 614; *Renner v. Supreme Lodge B. S. B. Soc.* 89 id. 401, 404. The member holding the certificate had the same right to assign it as had the holder of a life policy, with the assent of the society. *Bursinger v. Bank of Watertown*, 67 Wis. 75, 81, and cases there cited; *Estate of Breitung*, 78 id. 33, 35; *Brown v. Mansur*, 64 N. H. 39; *Eastman v. Provident M. R. Asso.* 62 id. 555; *Maneely v. Knights of Birmingham*, 115 Pa. St. 305; *Mitchell v. Grand Lodge I. K. of H.* 70 Iowa, 360; *Walter v. Henzel*, 42 Minn. 204. There is nothing in the statutes or in the constitution of the society prohibiting such a change of beneficiary, and if there was in the latter the society could waive it. *Morrison v. Wis. O. F. M. L. Ins. Co.* 59 Wis. 162, 169; *McCoy N. W. Mut. R. Asso.* 92 Wis. 577, 583.

For the respondents there was a brief by *Krez, Kellogg & Krez*, and oral argument by *Conrad Krez*. They contended, *inter alia*, that to allow a member to dispose of his certificate for the benefit of creditors was not only to assume the powers of a life insurance company, but to deprive the heirs of a member of the aid intended for them; and for both reasons its acts would be *ultra vires* and void. *Ballou v. Gile*, 50 Wis. 614; *Britton v. Supreme Council R. A.* 46 N. J. Eq. 102; *S. C.* 19 Am. St. Rep. 376.

CASSODAY, C. J. Our statutes authorize the formation of a corporation in the manner therein prescribed, "for the mut-

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ual support of the members, their families or kindred, in case of sickness, misfortune, poverty or death; or for contributing to the burial of the dead." S. & B. Ann. Stats. sec. 1771. By virtue of such authority, the defendant was duly incorporated July 17, 1888. The articles of incorporation provided, among other things, "that we do hereby associate for the purpose of forming a corporation under the said Revised Statutes, and the various acts amendatory thereof, for the purpose of mutual aid, in cases of sickness, accident, and death, of its members or their families. . . . Said corporation is formed without capital stock, and organized exclusively for benevolent and charitable purposes, and no dividend or pecuniary profits shall ever be made or declared by such corporation to its members." Its constitution declared it to be the object of the corporation "to associate all male persons of good character who are sociably acceptable, and to the best ability provide their relatives with material and moral aid; to establish a relief fund for the benefit of its sick members; to establish a fund out of which there shall be paid, upon sufficient proof of the death of a member in good standing, who has complied with all lawful regulations, a sum of not exceeding $2,000 to the heirs, as directed by the member."

January 2, 1893, Paul Groth became a member of the organization, and received a certificate of membership therefrom, to the effect that the defendant thereby promised and bound itself to pay a sum of not exceeding $2,000 to *Karl Groth* and wife, his parents, in conformity with the laws of the organization, after sufficient proof of the death of said member, and upon the return of the certificate, provided that said member is of good standing in the organization at the time of his death, and that this certificate has not been returned by said member and another issued according to the laws of the association. November 28, 1894, Paul Groth delivered such certificate to the defendant, with the written request

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to issue to him a new one, and payable to William Froderman and wife. Thereupon, and on December 22, 1894, the defendant issued to Paul Groth a new death benefit certificate, wherein it, in effect, promised and bound itself to pay a sum of not exceeding $2,000 to William Froderman and wife, after sufficient proof of the death of said member, and upon the return of that certificate, with a proviso as in the other certificate.

January 6, 1895, Paul Groth died; and after satisfactory proofs of such death having been made, and on August 15, 1895, the plaintiffs named in the certificate of January 2, 1893, as beneficiaries, commenced this action to recover the amount due upon the promise and agreement contained in that certificate. The defendant answered to the effect that Paul Groth has surrendered such old certificate, and duly accepted a new certificate issued to him instead thereof, designating William Froderman and wife as beneficiaries; and that the defendant had paid unto and settled with William Froderman and wife for the whole amount of such claim. At the close of the trial, and with the consent of the parties, the court directed a verdict for the plaintiffs, with the understanding and agreement that the court would hear the question of law discussed by the parties, and, upon that hearing, the court might either set aside the verdict and render one in favor of the defendant, or affirm the verdict and direct a judgment in favor of the plaintiffs, as he might see fit, or set aside the verdict and grant a new trial. Thereupon, after hearing the questions of law discussed, the court affirmed such verdict and directed a judgment in favor of the plaintiffs, and from the judgment entered thereon the defendant brings this appeal.

It was admitted on the trial that Paul Groth was, at the time of his death, twenty-nine years of age and unmarried, and that William Froderman and wife were in no way related to him by blood or marriage. The only reason given

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for surrendering the old certificate and issuing the new one is that Paul was sick at the house of William Froderman; that he had asked aid of his parents, the plaintiffs, and that they had refused to grant the same; and that he had become so indebted to Froderman that he had, by such certificate, secured him in case something should happen to himself.

Under the section of the statute cited, and the articles of incorporation and the constitution of the defendant, it is manifest that there was no authority for issuing the new certificate to persons who were neither kindred of his nor members of his family. The fact that Paul was sick and wanted aid, as indicated, would have justified him in applying to the defendant for aid; and then, under the contract, the defendant would probably have aided him. But no such aid was asked for, or given. The liability of the defendant upon the death of Paul is conceded. The fact that the plaintiffs were the parents of Paul and named as beneficiaries in the first certificate is conceded.

The attempt to substitute strangers as beneficiaries in place of the parents was contrary to the statute and articles of incorporation, and hence was null and void, and constituted no consideration for the alleged surrender of the old certificate. *Grace v. N. W. Mut. R. Asso.* 87 Wis. 562, and cases there cited; *Renner v. Supreme Lodge B. S. B. Soc.* 89 Wis. 401; Niblack, Ben. Soc. & Acc. Ins. § 158.

By the Court.— The judgment of the superior court of Milwaukee county is affirmed.

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BADGER PAPER COMPANY, Appellant, vs. ROSE and others, Respondents.

January 12 — February 2, 1897.

Corporations, when competent to contract: Stockholders' liability.

1. A corporation becomes such, under our statute (secs. 1772, 1773, R. S.), on the day upon which its articles of incorporation are filed for record in the office of the proper register of deeds, and it is then capable of contracting obligations in its corporate capacity, though not fully organized; subject, however, to the statutory disability as to enforcing contracts made with nonmembers, before at least one half its stock shall have been subscribed for and twenty per cent. thereof actually paid in, and also to the personal liability of the stockholders upon such contracts.
2. Until such a corporation has become fully organized by the election of directors, the signers of the articles of incorporation have authority to manage its affairs, and a contract made by them in the name and for the benefit of the corporation binds it. No ratification thereof is necessary; yet if the corporation when organized does ratify the same, such ratification will relate back to the time when the contract was made.
3. A person does not become a stockholder by merely signing a written agreement to take stock in a corporation to be formed, nor until such subscription paper has been presented to the corporation and accepted by it; and consequently he is not subject to personal liability upon a contract made before he so becomes a stockholder.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

Action to enforce the personal liability of stockholders of a corporation for its debt contracted before the statutory requirements as to subscription and payment for stock had been complied with.

Prior to the 1st day of September, 1893, in contemplation of organizing a corporation to publish a Democratic morning newspaper in the city of Milwaukee, a subscription list was circulated, for the purpose of obtaining signers thereto

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of persons who were willing to take stock in such an enterprise. The subscription paper was headed as follows: "We, the subscribers, do hereby subscribe for the capital stock of a corporation to be organized under the laws of Wisconsin, to own and operate and publish a Democratic morning newspaper in the city of Milwaukee. Our said subscriptions to be paid as follows, to wit, twenty-five per cent. at the time of the organization of said corporation upon call of the treasurer, and the remaining seventy-five per cent. in instalments, as the same may be called upon assessment levied by the board of directors." All the defendants signed such subscription list prior to, or soon after, the 1st day of September, 1893.

For some time prior to such date Clarence L. Clark operated a publishing establishment at the city of Madison, Wisconsin, and there published a Democratic newspaper called the "Madison Times." It was in contemplation that the plant would be removed to Milwaukee, and sold to the proposed corporation. Pursuant to such scheme articles of organization of a corporation were duly prepared, according to the laws of this state on the subject of the organization of corporations, the original of which was filed and recorded in the office of the register of deeds for Milwaukee county, Wisconsin, on the 5th day of September, 1893, and a properly verified copy thereof was duly filed in the office of the secretary of state. Clarence L. Clark was one of the chief promoters of the enterprise, and one of the signers of the articles of organization.

About the time such articles were filed Clark removed the aforesaid newspaper plant from Madison, Wisconsin, to Milwaukee, and there rented rooms and fitted the same up ready for the use of the corporation. All of the business of making such removal, renting rooms, and fitting up the plant in Milwaukee, ready for operations, was conducted by Clark, up to the meeting for the purpose of perfecting the

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organization of such corporation, hereafter mentioned. On the 27th day of September, 1893, pursuant to a request made by Clark, as manager of the corporation, H. A. Frambach, on behalf of plaintiff, visited Milwaukee, and there contracted to sell to the Times Printing Company a quantity of paper for the use of such company. The business was done with Clark, who assumed to act for the corporation. He told plaintiff's agent that the company was incorporated, and to bill the paper to it. Thereafter, pursuant to the contract, the paper was sent to the Times Printing Company, and after the 6th day of October, 1893, the same was used by the corporation in the conduct of its business, but without notice on the part of the directors of the corporation, or any of the defendants, that any one was indebted to plaintiff therefor.

On the 6th day of October mentioned the persons who had signed the subscription paper, including defendants, convened for the purpose of organizing the corporation. Such subscription paper was then presented, and the signers participated in the organization, which was then and there completed, Clark being chosen manager. Thereafter, under the directions of Clark, the paper theretofore purchased was used. Clark subscribed for $40,000 of the stock, and turned over to the corporation the newspaper plant theretofore fitted up by him as aforesaid, and all material on hand, with the good will of the Madison Times and its subscription list, also the franchise of the United Press Association, in payment of such subscription.

This action was brought against the defendants as stockholders, under the statute which provides that if any corporation contracts debts before half its stock is subscribed for, and twenty per cent. thereof paid in, its stockholders then existing shall be personally liable for such debts. On the trial the facts above set forth appeared by the evidence uncontroverted; whereupon the court, on motion, directed a ver-

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dict in favor of the defendants, to which plaintiff excepted. Judgment was entered pursuant to such verdict, from which plaintiff appealed.

Nathaniel S. Robinson, for the appellant, argued, among other things, that the contract sued on became the contract of the Times Printing Company by ratification, and that such ratification related back to the inception of the contract. The subscription for stock signed by the defendants was absolute on its face, and not conditional, and the contract made in their behalf became binding on the corporation immediately upon its organization. *Richelieu Hotel Co. v. International M. E. Co.* 140 Ill. 248.

For the respondents there was a brief by *Timlin & Glicksman*, and oral argument by *W. H. Timlin*.

MARSHALL, J. The first question to be determined is, To whom did plaintiff contract to sell the paper? In determining that question, the date when the Times Printing Company became a corporation competent to contract, as such, is important. Sec. 1772, R. S., provides that the articles of organization, or a verified copy thereof, "shall be recorded by the register of deeds of the county in which such corporation is located; and no corporation shall, until such articles be so left for record, have legal existence." Sec. 1773, R. S., provides that, "until the directors or trustees shall be elected, *the signers of the articles of organization shall have direction of the affairs of the corporation*," and that "no such corporation shall transact business with any others than its members, until at least one half of its capital shall have been duly subscribed, and at least twenty per centum thereof actually paid in; and if any obligation shall be contracted in violation hereof, the corporation offending shall have no right of action thereon; *but the stockholders then existing* of such corporation shall be personally liable upon the same." It is hardly possible that one can mis-

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understand the plain meaning of these provisions. Clearly, the Times Printing Company became a corporation on the 5th day of September, 1893, the day the articles of organization were filed for record in the office of the register of deeds for Milwaukee county. From that day till October 6, 1893, the signers of the articles, *D. S. Rose*, Clarence L. Clark, and Peter Mulholland, had lawful authority to manage its affairs. During that time it was capable of contracting obligations in its corporate capacity, subject to the statutory disability respecting the enforcement of the same, but liable, nevertheless, thereon, and its stockholders existing at the time of the making thereof personally liable as well.

It follows that the Times Printing Company, as a corporation, had lawful authority on the 27th day of September, 1893, to contract with plaintiff for the paper. On that day its agent testifies that he sold the paper to such corporation, and with knowledge that, though incorporated, it had not yet been organized. The evidence clearly shows that, prior to that time, and thereafter till the 6th day of October, 1893, the signers of the articles of organization, represented by Clark as manager, were active in promoting the corporate enterprise, and preparing to publish the paper as soon as the organization of the corporation could be perfected, and that the material in question was contracted for in furtherance of the general plan in which the corporators were engaged. The question of ratification was argued at considerable length by counsel to show that the obligation to pay for the paper became the contract of the corporation by ratification subsequent to its organization, though it is not claimed that there was any act of ratification other than by using the paper; but, in our view of the case, no ratification was necessary to make the contract with the plaintiff that of the corporation. But, conceding that there was a ratification as claimed, it was of a contract theretofore made, in the name of and for the benefit of an existing corporation, by one who

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assumed to act as its manager; hence such ratification would relate back to September 27, 1893. Ratification presumes power on the part of the ratifier to have made the contract in the first instance. *McArthur v. Times Printing Co.* 48 Minn. 319. Counsel for plaintiff seeks to make the contract that of the corporation upon the theory of adoption, instead of ratification, strictly so called. There is abundance of authority to support such doctrine when applied to contracts for the benefit of projected corporations. *McArthur v. Times Printing Co., supra; Pittsburg Mining Co. v. Quintrell*, 91 Tenn. 693; Thompson, Corp. § 5322. But the better view is that the corporation does not become liable after its creation, by "ratification," as the term is ordinarily understood, because ratification, as stated, presumes ability to contract at the time the unauthorized contract was made. Where there is no corporation in fact there cannot be any agent; hence the liability which the corporation incurs by adopting a contract made for its benefit before it had legal existence does not relate back to the unauthorized act, and make a contract as of that date, but the contract dates from the adoption of such act (*Pratt v. Oshkosh Match Co.* 89 Wis. 406), though no such case is presented here. When the obligation in question was incurred, the corporation was in existence. Clark and his assistants had absolute control of its affairs. The contract was made with the corporation through Clark, acting as its manager. It was within the scope of the business which the corporation was organized to conduct; hence whether Clark originally had authority to act from his associates or not, or whether the corporation became liable by subsequent ratification, such liability dates from the 27th day of September, 1893.

The foregoing renders it unnecessary to spend time considering whether there was a ratification by the corporation or not, in respect to which counsel for both sides argued at considerable length in the briefs.

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The only remaining question is, Were the defendants stockholders of the corporation at the time the contract was made? It is alleged, in effect, that they were such stockholders, and on that the case turns. On the subject of when a person may be said to be a stockholder in a corporation there is some conflict of opinion, but it is nowhere held that one can become such without being the owner or holder of stock or a subscriber therefor. If the defendants were stockholders, they were such by virtue of having merely signed a paper which bound them to take stock in a corporation to be formed. To be sure, the paper signed is in the form of a present subscription for stock, but all, or nearly all, the signers subscribed before the articles of organization were filed. All signed long before there was any corporate organization, and the paper expressly states that the subscribers subscribed for stock in a corporation to be formed. At most, it can only be said to have constituted an agreement to take stock. The mere signing of the paper did not make the signers stockholders. Much learning has been displayed respecting this subject by the text writers, and many adjudications exist in the courts of this country respecting just what the *status* is of a mere signer to such a subscription paper under such circumstances. The subject is treated in article 21 of Thompson's Commentary on the Law of Corporations, under the title "The Contract of Subscription," commencing with sec. 1136. But all the authorities substantially agree that, until the subscription paper has been presented to the corporation and assented to by it, the signers are not stockholders. In *Minneapolis Threshing Machine Co. v. Davis*, 40 Minn. 110, the character of such a subscription paper was considered, and the conclusion reached that it was a binding contract between the subscribers to take stock and to pay therefor according to their respective subscriptions, and hence that they became stockholders at the instant such subscriptions were accepted by the corporation. Says Mr. Justice

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STONE on the same subject, in *Knox v. Childersburg Land Co.* 86 Ala. 180: "Such an agreement is in no sense a subscription to stock. Something more must be done before it can be affirmed that the subscription is a complete contract." To the same effect are *Athol Music Hall Co. v. Carey*, 116 Mass. 473; *Ashuelot B. & S. Co. v. Hoit*, 56 N. H. 548; *Buffalo & J. R. Co. v. Gifford*, 87 N. Y. 294. In Waterman, Corp. (sec. 177), it is stated, in effect, that if a number of persons mutually agree to become stockholders in a corporation to be formed, their agreement is in the nature of a continuing offer, which offer, by acceptance, consummates the contract of membership and makes the subscribers stockholders. In *McClure v. P. F. R. Co.* 90 Pa. St. 269, the form of the subscription paper was that of a present subscription for the stock of an existing corporation. The court held, in effect, that the subscribers became stockholders from the instant of the acceptance of a subscription by the corporation, not before. In *Buffalo & J. R. Co. v. Gifford, supra*, the form of the subscription was as follows: "We, the undersigned, in consideration of, and for the purpose of, becoming stockholders in the Buffalo & Jamestown Railroad Company, do hereby subscribe and take the number of shares, of $100 each share, of the capital stock of said company set opposite our respective names, and agree to pay therefor," etc. The subscriptions were obtained by one who afterwards became a director of the corporation so organized. The subscription paper was delivered to and accepted by the corporation, and the subscribers participated as such in the business of the corporation. The court held that the subscription was not valid to make the subscribers stockholders in the first instance, but that they became such by the acceptance of the subscription by the corporation. Decisions along this line could be multiplied at great length, but suffice it to say that no well-considered case can be found which holds that a mere agreement to subscribe for, or a subscription to, the stock of

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a corporation to be formed, will constitute the subscribers stockholders, and as all of the defendants were so circumstanced September 27, 1893, they were not stockholders existing at the date the contract was made, upon which this action depends, hence not liable thereon under the provisions of sec. 1773, R. S.

By the Court.— The judgment of the superior court is affirmed.

WISCONSIN KEELEY INSTITUTE COMPANY, Respondent, vs. MILWAUKEE COUNTY, Appellant.

January 12 — February 2, 1897.

Constitutional law: Police power: Drunkards, county liability for treatment of: Taxation.

Chapter 203 of the Laws of 1895, providing that habitual drunkards who are "pecuniarily unable to procure and pay for treatment for such disease" may, by order of the county court or of the judge thereof, be sent for treatment to some institution in the state for the cure of such disease at the expense of the county in which they reside, is not a legitimate exercise of the police powers of the state. It also involves the imposition upon the county, without its consent, of a tax for the benefit of private institutions and individuals, not the legitimate objects of public charity. It is therefore unconstitutional and void, and an institution to which a drunkard has been so sent for treatment cannot recover from the county therefor.

APPEAL from an order of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Reversed.*

The case is fully stated in the opinion of the court.

N. S. Murphey, for the appellant.

For the respondent there was a brief by *Rietbrock & Halsey* and *E. E. Chapin*, and oral argument by *E. E. Chapin* and *L. W. Halsey*. They argued that the police power of the state extends to all regulations affecting the health, good

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morals, peace, and safety of society, and may properly be exercised whenever the legislature deems it necessary for the public welfare and safety. 18 Am. & Eng. Ency. of Law, 746; Tiedeman, Lim. of Police Power, § 2; *Butler v. Chambers*, 36 Minn. 69; *People v. Smith*, 66 N. W. Rep. 382. Drunkards are not only a burden but a menace to society, and are proper subjects of legislative solicitude and restraint. *Comm. v. Whitney*, 11 Cush. 479. It is for the interest of society to reduce the suffering caused by drunkenness as much as possible, and for that purpose the state may lawfully establish asylums and hospitals. *Baltimore v. Keeley Inst.* 81 Md. 106; *Milwaukee Indust. School v. Milwaukee Co.* 40 Wis. 328. So long as the state and county have made no such provision for their care and treatment, it should be obtained where it would be cheapest and most efficient, and the sums to be paid to private institutions under this statute are not donations but compensation for care and treatment.

CASSODAY, C. J. Ch. 203, Laws of 1895, provides, in effect: (1) That when any citizen of the state becomes an habitual drunkard, and is pecuniarily unable to procure and pay for treatment for such disease, any citizen of the state, the next friend, the attending physician, or any public officer may petition the county court or judge thereof, within and for the county where such habitual drunkard resides, for an order of said court or judge thereof permitting said habitual drunkard to take treatment at some institution for the cure of drunkenness and drug addictions, established within the state, at the expense of the county, as the county judge may select. (6) That the term "habitual drunkard," as defined by the act, includes all persons addicted to the use of spirituous, malt, or fermented liquors, morphine, opium, cocaine, or other drugs or narcotics to such a degree as to deprive him or her of the power of reasonable self-control. (2) That

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such petition is required to set forth the full name, age, and residence of such habitual drunkard, whether married or single; that he has resided within the state at least one year previously; that he has not the means to pay for such treatment, nor have the person or persons, if any, who are charged with his support; what addiction he is affected by; that he appears to be unable to abstain by means of will power alone; and praying that such habitual drunkard may have treatment at the expense of the county at such institute,—such petition to be signed and verified by the petitioner, and accompanied by a certificate, signed and sworn to by two reputable citizens and taxpayers, and the written consent of such drunkard to the granting of the prayer of the petition, and his agreement to take the treatment and obey the rules of the institution. (3) That, upon presenting such petition, verification, and written consent, the court or judge thereof, upon being satisfied of the truth thereof, shall cause an order to be entered that such drunkard shall be taken to some institution within the state, to be designated therein, provided that the expense of treatment in each case shall not exceed the sum of $130, which sum shall cover and include all expenses for treatment, medicines, and board for four weeks, and such expense shall be paid by the county; (4) that no such court or judge thereof shall send any person for treatment a second time; (5) that any person so treated is at liberty to reimburse the county.

The complaint alleges, in effect, the incorporation of the plaintiff; that one J. S. White, an alleged habitual drunkard, age forty-two years, and a married man, and a resident of the defendant county, was, May 31, 1895, upon the requisite petition, certificate, verification, and consent of the said White, ordered by the county court to be conveyed to the Keeley Institute at Waukesha, for treatment for such habitual drunkenness, at the expense of Milwaukee county, not to exceed $130; that, under such commitment, said White

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was duly conveyed to the plaintiff's said institution for such treatment, and was duly received into the plaintiff's institution for treatment, and was duly treated for said drunkenness and inebriety for a period of four weeks, commencing May 31, 1895, and the plaintiff in all things conformed to and complied with the terms and provisions of said act; that the defendant, by reason thereof, became and now is indebted to the plaintiff therefor in the sum of $130, with interest,—and prays judgment accordingly. To that complaint the defendant demurred, on the ground that it did not state facts sufficient to constitute a cause of action. From the order overruling the demurrer the defendant brings this appeal.

It is conceded that White was committed to the plaintiff's institute in the manner required by the act, and was there treated for drunkenness, as alleged, and that the plaintiff is entitled to recover in this action if the act in question is valid. On the other hand, it is obvious that, if the act is void, then the action cannot be maintained. The question presented, therefore, turns entirely upon the constitutionality of the act. It is undoubtedly true, as claimed by counsel for the plaintiff, that the state legislature has authority to exercise any and all legislative powers not delegated to the federal government, nor expressly or by necessary implication prohibited by the national or state constitution. *Bittenhaus v. Johnston*, 92 Wis. 595, and cases there cited. So, it is undoubtedly true, as claimed, that a statute should, if possible, be so construed as not to be in conflict with the constitution. But no construction is permissible which defeats the obvious purpose and object of constitutional restrictions.

Counsel for the plaintiff contend that the act in question comes within the police power of the legislature, and is therefore valid. Such power undoubtedly extends to the regulation and protection of the lives, limbs, health, comfort, good

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order, morals, peace, and safety of society, and hence may be exercised on many subjects and in numerous ways. *State v. Heinemann*, 80 Wis. 256, and cases there cited; *Bittenhaus v. Johnston*, *supra*. Mr. Cooley defines such power in the following language: "The police of a state, in a comprehensive sense, embraces its whole system of internal regulation, by which the state seeks not only to preserve the public order and to prevent offenses against the state, but also to establish, for the intercourse of citizens with citizens, those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others." Cooley, Const. Lim. (6th ed.), 704. Mr. Tiedeman gathers from the American definitions given by him that "the term must be confined to the imposition of restraints and burdens upon persons and property." He further says: "The power of the government to embark in enterprises of public charity and benefit can only be limited by the restrictions upon the power of taxation, and to that extent alone can these subjects in American law be said to fall within the police power of the state." Tiedeman, Limitations, 4. It is not denied, if not conceded, that the legislature has ample power to suppress drunkenness and intemperance. The statutes have for many years provided for the care of inebriates in county asylums. R. S. secs. 604*f*, 604*g*. So they have provided for placing drunkards under guardianship, and committing them to asylums. R. S. secs. 3978, 3979; *State ex rel. Larkin v. Ryan*, 70 Wis. 683, 684. The power of the legislature to pass such laws is not questioned. Nor is the power of the legislature to prescribe laws for reclaiming drunkards by public authority here involved. We are clearly of the opinion that the act in question is not an exercise of the police power as above defined. On the contrary, it is for private purposes, and to benefit

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private parties. The plaintiff is a private corporation, organized under the general laws of the state, and conducted for private gain. The mere fact that it is subject to visitation and inspection by public officials does not make it a public institution. The manifest purpose of the act is to compel the county in which any citizen resides who has become "addicted to the use of spirituous, malt or fermented liquors, morphine, opium, cocaine, or other drugs or narcotics, to such a degree as to deprive him or her of the power of reasonable self-control," who has been committed to such institute, in the manner indicated, to pay such institution a sum not exceeding $130 "for treatment, medicines, and board for four weeks," furnished to such person. True, such person is only to be so committed in case he "has not the *means to pay for said treatment*, nor have the person or persons, if any, who are charged with his support." This language clearly implies the ready means or money to make such payment. It does not mean that such person has become a pauper, or that he has become dependent upon charity or benevolence for support. *Rhine v. Sheboygan*, 82 Wis. 352. It is there said by Mr. Justice PINNEY that "the word 'poor,' in the statute, has a restricted and technical meaning, and it is practically synonymous with 'destitute,' denoting extreme want and helplessness." In that case, it was, in effect, held, that where a man has property of considerable value over and above incumbrances, and not indispensable for daily use, but available, by way of sale or security, for support, he is not a poor person for whose support the town is liable under the statute. *Ettrick v. Bangor*, 84 Wis. 256.

The act in question does not go upon the theory that the victim of such addiction is helpless and destitute, and hence the subject of public charity. It does treat such addiction as a "disease;" but it does not treat it as a contagious or infectious disease, and there is no allegation or claim that it

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is a contagious or infectious disease. The question recurs whether any county may be compelled to pay any private party for treatment, medicines, and board of any resident therein, having a disease not contagious or infectious, merely because such diseased person "has not the means to pay for said treatment." If a county may be compelled to make such payment for such treatment, medicines, and board of a person having such a disease, then it logically follows that every county may be compelled to pay private parties for treatment, medicines, and board of any person having any disease, though not contagious nor infectious, provided the victim has not the present means of making such payment himself. We are clearly of the opinion that no such power exists. This is the result of numerous decisions in this court which might be cited. A few only will be referred to. In *Curtis's Adm'r v. Whipple*, 24 Wis. 350, the town of Jefferson was authorized by statute to raise, by tax, $5,000 to aid in the erection of buildings for the "Jefferson Liberal Institute" therein, in case the majority of the votes cast upon that question at a special town meeting to be held should be in favor of such tax. The electors having decided affirmatively, the tax was accordingly assessed upon the taxable property of the town. Curtis resisted the payment of the tax, and, when his personal property was taken therefor, he brought the action for the wrongful taking and conversion, and recovered. The court held, in effect, that the "Jefferson Liberal Institute" was essentially a *private* educational institution, in which neither the town nor its inhabitants, *as such*, had any interest or power of control; and hence the act empowering the town to raise by taxation the sum mentioned was invalid. That decision has frequently been affirmed by this court. *Whiting v. S. & F. du L. R. Co.* 25 Wis. 181; *State ex rel. McCurdy v. Tappan*, 29 Wis. 664, 684; *Attorney General v. Eau Claire*, 37 Wis. 436. As stated by RYAN, C. J., in the case last cited: "Taxation is the absolute

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conversion of private property to public use. And its validity rests on the use. In legislative grants of the power to municipal corporations, the public use must appear. . . . The legislature can delegate the power to tax to municipal corporations for public purposes only; and the validity of the delegation rests on the public purpose. Were this otherwise, as was said at the bar, municipal taxation might well become municipal plunder." Page 438, citing numerous cases in this court in support of the proposition. Here the act compels payment without the consent of the county or its taxpayers; and in such cases the purposes for which taxation may be authorized are much more restricted than where such consent is first obtained, as indicated in numerous decisions of this court. *Lund v. Chippewa Co.* 93 Wis. 640, and cases there cited.

A learned writer on constitutional law says upon this subject: "So, a municipal corporation cannot be authorized to tax the citizens for the support of a school, hospital, or library, although its doors are open to the public and a great number of persons will participate in the advantages which it confers, unless it is a public agency, or controlled and managed by the state. The power would seemingly be limited, though there were no express prohibition. It is inherent in the idea of taxation that it should be for the public good; and a law taxing one set of men for the benefit of another, or in furtherance of an industrial enterprise in which they were engaged, would be regarded as confiscation in all civilized countries. . . . Schools, almshouses, and hospitals occupy an intermediate position, and may be public or private uses, according to circumstances. When controlled by the commonwealth, and open to all who need such aid, they are public uses, and may be endowed and sustained by taxation; but it cannot properly be employed for the support of any institution, however admirable or useful, which is in the hands of private persons who are not accountable to

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the government." 1 Hare, Am. Const. Law, 280, 284, citing, among other cases, *Loan Asso. v. Topeka*, 20 Wall. 655; *Lowell v. Boston*, 111 Mass. 454; *St. Mary's Industrial School v. Brown*, 45 Md. 310. To the same effect, *Philadelphia Asso. v. Wood*, 39 Pa. St. 73; *Hitchcock v. St. Louis*, 49 Mo. 484; *State ex rel. Griffith v. Osawkee*, 14 Kan. 418. The Massachusetts case cited appealed strongly to the generosity of the people, as the legislative enactment authorized Boston to aid in rebuilding portions of the city destroyed by the great fire of 1872; but the act was held to be unconstitutional and void. The Kansas case made a similar appeal, and involved the validity of a legislative enactment authorizing townships to provide "the destitute citizens of such townships with provisions, and with grain for seed and feed;" but the act was held to be unconstitutional and void, as not being for a public purpose. The opinion in that case was written by Justice BREWER, now a justice of the supreme court of the United States; and it is not only instructive, but, as we think, unanswerable.

Three cases are cited involving the validity of statutes somewhat similar to the one in question. The Maryland act was broadly distinguishable from the one at bar, and was held valid. *Mayor and City Council of Baltimore v. Keeley Institute*, 81 Md. 106. The Colorado act was more like ours, and it was held, in effect, that one who "is financially unable to pay for the treatment of such disease" belongs to a class of "poor who have become helpless and unable to care for themselves," and hence "within the governmental functions of the state," and the act was valid. *In re House*, 46 Pac. Rep. 117. The case is not made to turn upon the questions we have considered, and we cannot regard it as an authority in the case at bar. The Minnesota case is made to turn upon the delegation of power, and the law is held to be invalid. *Foreman v. Hennepin Co.* 64 Minn. 371.

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But it is unnecessary to continue the discussion. For the reasons given, we hold the act in question unconstitutional and void.

By the Court.— The order of the circuit court is reversed, and the cause is remanded for further proceedings according to law.

See note to this case in 36 L. R. A. 55.— REP.

ZANDER, Appellant, vs. VALENTINE BLATZ BREWING COMPANY, Respondent.

January 12 — February 2, 1897.

Ejectment: Trespass: Election of remedies.

An intrusion by one lot-owner of his foundation wall upon the land of the adjoining owner, without permission, is a trespass, and may be treated as a disseisin; but if the owner of the land so intruded upon extends his own building to his line and rests it upon such wall and occupies the same continuously, he thereby elects to treat the intrusion as a mere trespass, and cannot maintain ejectment therefor.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Affirmed.*

Ejectment to recover fourteen inches of land. Plaintiff owns lot 2, block 57, in the Seventh ward, city of Milwaukee. The defendant owns lot 1, immediately adjoining on the north. The north fourteen inches of lot 2 is in dispute. The evidence showed that in 1891 the defendant erected a building on lot 1. In making the necessary excavations, the defendant excavated a few inches beyond the line, and put in a foundation, which, it appears, extended about fourteen inches across the line, and under the north wall of the plaintiff's building. The plaintiff's possession was not otherwise disturbed, and he has ever since been, and now is, in posses-

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sion of his building, which extends clear up to his line, and rests in part upon the wall. The only question in the case is whether the building by the defendant of this foundation wall fourteen inches across the line constitutes a disseisin, so that ejectment will lie. The defendant, by its answer, disclaims title to the fourteen inches in question, and alleges that the wall was built at plaintiff's request. At the close of the evidence a nonsuit was granted, and the plaintiff appealed.

For the appellant there was a brief by *Fiebing & Killilea*, and oral argument by *H. J. Killilea*. To the point that trespass would not lie, but ejectment was the proper remedy, since the plaintiff had neither actual nor constructive possession of the land in suit at the commencement of the action, they cited *McCourt v. Eckstein*, 22 Wis. 153; *Pile v. Pedrick*, 167 Pa. St. 296, and many other cases.

For the respondent there was a brief by *Sylvester, Scheiber, Riley & Orth*, and oral argument by *F. Scheiber* and *M. M. Riley*.

WINSLOW, J. When this case was here before, the merits were not decided. 89 Wis. 164. Now, however, the question is fairly presented whether ejectment will lie. Both parties cite and rely upon *McCourt v. Eckstein*, 22 Wis. 157. In that case it appeared that some of the stones of defendant's foundation wall projected eight inches over upon plaintiff's land, and that the plaintiff erected his own building eight inches away from his line, thus leaving the eight-inch strip unoccupied. It was held, in effect, that the plaintiff might treat the encroachment as a disseisin, at his election, and if he had so treated it, he might maintain ejectment; and it seems further to have been held that there was enough evidence in that case to carry to the jury the question whether the plaintiff had elected to treat the defendant's act as a disseisin. In the present case there is, however, no

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such evidence. The testimony shows, without dispute, that the plaintiff is now, and always has been, in possession of his full lot. His building extends to the north line of his lot, and the only difficulty is that it rests upon a few inches of wall below the surface of the ground, which was built by the defendant without authority. This act of the defendant in intruding his foundation wall under the plaintiff's building was (if done without permission) undoubtedly a trespass. If the plaintiff had chosen, he might, under the rule of *McCourt v. Eckstein*, have treated it as a disseisin, and could have then maintained ejectment. But he has not treated it as a disseisin. On the contrary, by allowing his building to remain upon the foundation and by occupying that building up to his line continuously, he has undoubtedly elected to treat the defendant's act in building the wall as a mere trespass. The plaintiff has had the full and free possession and enjoyment of his entire lot ever since the wall was built. Ejectment cannot be maintained by one who is in the undisturbed possession of real estate. It is a remedy provided for one who is out of possession. This is elementary law.

By the Court.— Judgment affirmed.

On the question what disseisin will support ejectment, see note to *Harrington v. Port Huron* (86 Mich. 46), in 13 L. R. A. 664.— Rep.

DR. SHOOP FAMILY MEDICINE COMPANY, Respondent, vs. WERNICH, Appellant.

January 13 — February 2, 1897.

Libel: Pleading: Evidence.

1. The publisher of a newspaper on receiving a proposed advertisement of certain family medicines published in his paper an article in the form of a letter addressed to the proprietor of such medicine,

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saying, "Your advertisements will not be received in the columns of the L., although you offer us big pay. We have repeatedly advised our readers that by the manufacture and sale of such medicines the public are swindled out of their money." *Held*, that the article was libelous *per se*.

2. A complaint for a libel published in the German language, which sets forth the article in German, and alleges that being translated it "reads as follows," giving the alleged translation in words and figures, asserts in substance that the translation is a true one, and is sufficient in that respect.

3. Letters written to the medicine company by its patrons, stating how the newspaper article was understood by them and its effect upon readers in their vicinity, were not admissible in evidence in an action for the libel contained in such article, being mere hearsay.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Reversed.*

This is an action for an alleged libel published by the defendant in a semimonthly newspaper published in the German language at Milwaukee, Wisconsin, under the name of "Der Landwirth," of which the defendant was the publisher and proprietor. It was alleged that it had a large circulation among the farmers and citizens of the state of Wisconsin of German descent. That the plaintiff was a corporation authorized to manufacture, compound, and sell drugs and medicines and certain specific remedies for certain diseases, and through Dr. Shoop had sent to the defendant a request for certain space in the advertising columns of the "Landwirth," and that on September 1, 1893, defendant, intending to injure plaintiff, etc., did wilfully and maliciously compose and cause to be published in said newspaper, concerning the plaintiff, in the German language, a false, malicious, and defamatory article, which is set out in words and figures at length, followed by the allegation, "which said article, *being translated into the English language, reads as follows:* 'To Dr. C. I. Shoop, Racine, Wis., and W. A. Noyes, 820 Powers Block, Rochester, N. Y.: Your advertisements will

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not be received in the columns of the "Landwirth," although you offer us big pay. We have repeatedly advised our readers that by the manufacture and sale of such medicines the public are swindled out of their money. "Der Landwirth" [Husbandman] does not work in this way, but on the contrary desires to be to its readers a sincere and faithful adviser.' And by said false, defamatory article the defendant meant and intended to publish to the world that the remedies and medicines so sold and offered for sale by the plaintiff were fraudulent and worthless, and any person buying the same would be swindled," etc., "to the plaintiff's damage." The defendant demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. This demurrer was stricken out as frivolous. The defendant subsequently answered, denying malice, or that he wilfully intended to injure the plaintiff in its business and reputation, but admitted the publication of the German words set forth in the complaint, and alleged that the statements contained therein were true, but denied that the article, being translated, reads as alleged in the complaint, and gave what he averred was an accurate and correct rendering of said article into English.

The action came on for trial before a jury, and considerable testimony was given on the subject of the correctness of the translation. The plaintiff offered in evidence three certain letters, written by three several parties, to Dr. Shoop, one dated January 11, 1894, in which the writer said: "I have read in the 'Landwirth' that he would not for any money publish your remedies in his publication, inasmuch as it is nothing but a swindle. I can furnish you with hundreds of persons that have used your remedies and regained their health by the use of the same. Mr. E. M. Gowan, the druggist here, is now selling your preparations. I will send an order at the earliest opportunity. [Signed] M. Schmitt." The second letter was signed by one C. W. Ruoff, and stated

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that the writer wished the doctor would send him a bottle of his restorative, and one box of his nerve pills, and added: "If it had not been for the 'Landwirth,' I would have sent for medicine before. *Mr. Wernich* is opposed to all medicines. . . . Send the medicine at once." The third letter was signed, Henry Gerber, to Dr. Shoop, in which the writer stated: "I have not a very big order this time, as I have not sold all my remedies. . . . I find that many have read in the damn 'Landwirth.'— On the farms they have in many districts the damn practical counselor 'Landwirth' from Wisconsin. I had a good deal to contend. I had heard already in April last that he was trying, or that he was talking against your medicines, but not so much as now. It was said that Dr. Shoop had commenced suit against the 'Landwirth,' but lost his case, and now they argue his medicines are nothing but swindle. Please let me know the right version of this. I received a slip from his newspaper, which I send you herewith. Please send it back to me with your reply, as I desire myself to write this famous professor, Dr. Johannes Hackin, in order to stop his loose mouth." These letters, written, respectively, from three several places in Kansas, Kentucky, and Pennsylvania, were offered to show how the article in question was understood. Counsel for the defendant objected to the testimony, on the ground that it was incompetent, immaterial, and irrelevant. It appeared that the letters came by the ordinary course of mail, but the witness did not know the parties, only by correspondence. The court overruled the objection, and permitted the letters to be given in evidence. Evidence was given tending to show that the medicines in question were not patent medicines, but compounded by Dr. Shoop, and the plaintiff was selling the remedies in almost every state of the Union.

The court charged the jury that the article was libelous upon its face, but that the plaintiff, being a corporation,

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could not recover exemplary or punitory damages; that the gravamen of the action was the injury to the reputation of the medicines. The jury found a verdict for $500 in favor of the plaintiff. The defendant moved to set it aside, on the ground, among others, that the damages were excessive. The court denied the motion, and from a judgment on the verdict the defendant appealed.

For the appellant there was a brief by *McElroy & Eschweiler*, of counsel, and *Rietbrock & Halsey*, attorneys, and oral argument by *F. C. Eschweiler*.

For the respondent there was a brief by *Quarles, Spence & Quarles*, and oral argument by *W. C. Quarles*.

PINNEY, J. 1. There can be no doubt but that the article set forth in the complaint is libelous *per se*. As held in *Brown v. Vannaman*, 85 Wis. 451, "It was a written slander upon the plaintiff's trade and business, and as such it tended directly to prejudice the plaintiff therein, and hence, within well-established rules of law, was libelous *per se*."

2. The allegation in the complaint that the German words therein set forth, and constituting the libel in question, "being translated into the English language *read as follows*," setting out the alleged translation in words and figures at length, is a sufficient allegation that the translation is a correct translation. It would be understood by any person of ordinary intelligence as an assertion, in substance, that the translation was a true one. The objection is technical. The statute requires that allegations in pleadings "shall be liberally construed, with a view to substantial justice between the parties." R. S. sec. 2668. If the defendant considered the allegation indefinite and uncertain, his remedy, to take advantage of the defect, was by motion to make it more definite and certain. It is hardly to be conceived that the defendant could have been misled or prejudiced by the allegation in its present form, which is much the same as a like

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allegation in *Schild v. Legler*, 82 Wis. 73, and which was regarded as sufficient.

3. The three letters offered in evidence by the plaintiff, and received, were mere hearsay (*Anderson v. Fetzer*, 75 Wis. 562), and were not admissible. It was clearly error to receive them in evidence. Two of them contained statements calculated to affect and increase the damages awarded, and we cannot, from the record, say that they did not affect the amount of damages unfavorably to the defendant. The letters were not only objected to, but a motion was made to set aside the verdict on the ground of excessive damages, which was denied. As the evidence admitted was incompetent, there must, in such case, be a new trial, unless it appears that the incompetent evidence did not injuriously affect the result. For the error in admitting the letters in evidence, there must be a new trial. There are no other questions requiring notice.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded for a new trial.

LANDAUER and others, Appellants, vs. ESPENHAIN and others, Respondents.

January 13 — February 2, 1897.

Attachment: Evidence of fraud: Parties: Res adjudicata.

1. Under the rule of our statute that every action must be prosecuted in the name of the real party in interest, the payee of promissory notes who has transferred the same cannot maintain an action or an attachment for the debt so long as the notes remain in the hands of his assignee, even though, in transferring them, he indorsed them; but in that case, if he afterward pays and takes them up he is remitted to his original rights.
2. If the notes when taken were voidable for the fraud of the maker, and the assignee in taking them relied upon the credit of the in-

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dorsement, that could not operate as a reservation of any legal interest in the assignor, and he could not lawfully do anything to impair their value in the hands of the assignee, as by electing to declare them void.

3. In an attachment suit, evidence that the maker of the notes sued on absconded two months after they were made, taking with him a large amount of property and money, and, though having in his possession property largely in excess of his debts, left too little to satisfy all of his creditors, does not establish that he was insolvent when he departed, and much less that he was so when he gave the notes; nor that he then intended to abscond and not pay them.

4. A judgment in favor of plaintiffs in an action upon notes which they had previously transferred to a bank is not conclusive that they owned the cause of action at the time of the recovery or that it was due at the commencement of the action, as against other creditors of the maker who were not parties nor privies to the action, and does not bar them from asserting their rights to precedence.

APPEAL from a judgment of the superior court of Milwaukee county: R. G. SIEBECKER, Judge. *Reversed.*

The plaintiffs are the members of several trading copartnerships, which are creditors of one F. Steinkirchner, who was at one time a trader in Milwaukee. The defendants *Espenhain* and *Bartels* are also creditors of Steinkirchner. The defendant *Burnham* was the sheriff of Milwaukee county. Steinkirchner absconded May 14, 1889, taking with him a large amount of property or money. The defendants *Espenhain* and *Bartels* commenced an action against Steinkirchner on the 15th day of May, 1889, for the recovery of $2,200, claimed to be due them for merchandise sold to him, and attached his stock of goods, which were of the value of upward of $7,000. The plaintiffs, as several copartnerships, also commenced their several actions on their several claims, and levied attachments upon the same goods, subsequently to the levy of the defendants' attachment. They then attacked the defendants' attachment, by intervening petitions, by which they claimed that the defendants were not *bona*

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fide, or at all, creditors of Steinkirchner, but had taken time notes for their claim, upon which this attachment was based, and had transferred the notes to the Merchants' Exchange Bank, and so had no claim against the common debtor.

The facts were that the defendants had sold goods and merchandise, to a large amount, to Steinkirchner, and had taken his time notes for the indebtedness, and had transferred the notes to the Merchants' Exchange Bank, in payment of their indebtedness to the bank. The notes were owned by the bank, and none of them were due at the time when the action was commenced and the attachment issued.

Yet the affidavit upon which the defendants' attachment had been issued stated that Steinkirchner "is indebted to the plaintiffs in the sum of $2,200, and that the same is due upon express contract." The ground stated for attachment is that the defendant "has assigned . . . and is about to assign . . . his property, with intent to hinder, delay, and defraud his creditors." The ground of the plaintiffs' intervention was that the defendants did not own the claim upon which this action and the attachment were based, having sold it to the bank, and that it was not then payable. To meet this contention, the defendants presented the affidavit of the defendant *Bartels*, which stated that he (the affiant) had personal knowledge of the matters stated, and that the notes which had been transferred to the bank had been given on a consideration entirely different from and independent of the indebtedness on which the attachment had been issued, and that the notes included no part of such indebtedness, but that the attachment was based upon an indebtedness for other goods sold, for the amount of the claim of $2,200, for which no notes had been given.

Upon this showing, the court denied the plaintiffs' application. On appeal to this court it was held that such denial was not an abuse of the discretion of the court. 74 Wis. 379. This action was then commenced by the plaint-

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iffs for the purpose of having their attachments made liens upon the attached goods, prior to the lien of the defendants' attachment. The attached goods were sold by the sheriff, and realized the sum of $7,727, a part of which has been paid into court, to abide the result of this action. Five years after the commencement of their action, in December, 1894, the defendants entered judgment in their attachment suit, for the very indebtedness which had been included in the promissory notes, and no other. After the maturity of the notes, the defendants had paid them to the bank, and received them back. The notes were surrendered and canceled at the time of the entry of judgment.

This is the substance of the facts established by the evidence given upon the trial of this action. The trial court found, as conclusions of fact, "that said notes were given by said Steinkirchner while insolvent, without any intention of paying the same, and while contemplating absconding from the state, and fraudulently, and did not operate either as a payment of said indebtedness, or to secure a valid extension of the time of the payment of said indebtedness," and that "the notes were so discounted by the bank solely on the faith of the indorsement thereof by *Espenhain* and *Bartels*," and dismissed the action. There is no direct evidence to prove either of the facts so found, except as they are inferred from the facts that, after Steinkirchner absconded, his creditors failed to find sufficient property to satisfy all their claims, and that the defendants paid the notes to the bank, and received them back. The plaintiffs duly excepted to the findings, and bring this appeal.

For the appellants there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *E. P. Vilas*.

For the respondents there was a brief by *Quarles, Spence & Quarles*, and oral argument by *T. W. Spence*.

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NEWMAN, J. In this state every action must be prosecuted in the name of the real party in interest. R. S. sec. 2605. The real party in interest is the party who has the right to receive and control the recovery. The statute is imperative. Even though the vendor of a promissory note may retain some residuary, contingent, or equitable interest in the note, he cannot maintain an action upon it. Pomeroy, Code Rem. (3d ed.), § 135; *Gates v. N. P. R. Co.* 64 Wis. 64; *Cummings v. Morris*, 25 N. Y. 625. The defense that the plaintiff is not the real party in interest is, in general, an absolute bar to the action. A party without right to prosecute the action cannot maintain an attachment. That remedy is ancillary, merely, to the action. So, the defendants could maintain neither their action nor the attachment, unless they owned the indebtedness which was the cause of action, at the time of the commencement of their action. No doubt the law is that the taking of the vendee's promissory note by the vendor of chattels is not an absolute payment for the chattels, in the absence of an agreement to that effect. But the taking of the note operates as a conditional payment. If the note is transferred, so long as it remains in the hands of the assignee it operates as an absolute payment of the original consideration. If the creditor who takes such securities is charged as indorser and takes them up, he is then remitted to his original rights. The suspended right of action, upon the original consideration, revives in him, and he may bring his action upon such original consideration, or upon such securities, at his election. *Battle v. Coit*, 26 N. Y. 404, and cases cited; *Meridan S. M. L. Co. v. Guy*, 40 Conn. 163.

If the notes taken by the defendants from Steinkirchner were voidable by them for the fraud of Steinkirchner, as found by the trial court, it would then become a serious question whether the defendants bore such a relation to the

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notes as would entitle them to make the election to hold them void. They had parted with their title to them, and they were then the property of the bank. They certainly could do nothing, lawfully, to impair the value of the notes in the hands of the bank, even if the bank did take them relying on the credit of their indorsement. That fact could not operate as a reservation of an interest, in a legal sense, in the notes. They were the absolute property of the bank, to be disposed of at its will, and were not, to any extent, under the dominion of the defendants. The transaction by which the bank obtained the notes was a purchase, in the usual course of business.

But the evidence which goes to prove the fraud found by the trial court is, at the best, but meager and unsatisfactory. It seems to consist exclusively in the fact that Steinkirchner absconded, taking with him a large amount of property or money, and leaving too little to satisfy all his creditors. At the time of his disappearance, he left many debts, and had an amount of property larger than his debts by a considerable margin. The property attached by creditors was sold by the sheriff for $7,727, and the court finds that he took with him "about $18,000." This does not establish very clearly that he was insolvent at the time of his departure. It does not show that he could not have continued his business, and paid his debts in the usual course of his business. It does not appear that creditors were pressing him. Much less does this prove that he was insolvent a month or two months earlier, when he gave the notes. Of course, his disappearance and withdrawal of his property, clandestinely, from the power of the process of his creditors, is a conclusive impeachment of his business integrity, but, as a proof of his insolvency at a previous date, it is far from conclusive. Nor is the evidence which is held to prove that, at the time when he gave the notes, he intended not to pay

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them, any more satisfactory. Apparently he was solvent at the time when he gave the notes. There is no evidence tending to show that he then meditated such a final wind-up of his business. He continued the business for some two or three months later. There is really no evidence that, at the time when he gave the notes, he intended other than to pursue his business. It is more probable that his resolution to abscond was of later origin. But, at best, it all rests in mere surmise, without basis upon any facts other than that he disappeared, taking property with him.

It seems to be claimed upon the part of the defendants that the judgment which the defendants entered against Steinkirchner, in their action against him, is conclusive upon the plaintiffs that they owned the cause of action upon which they recovered, and that it was *due* at the time of the commencement of their action. No doubt that judgment is conclusive upon the parties to the action and their privies. It binds no others. As a rule, a judgment is not admissible in evidence, either for or against a stranger to the action. 12 Am. & Eng. Ency. of Law, 84, and cases cited in note 4. The judgment has no relevancy in this action, either by way of estoppel or as evidence. All these questions could properly be inquired into in this action. *Sexton v. Rhames*, 13 Wis. 99. It was a competition for precedence among creditors. Each one had the right to avail himself of such technical advantage as the actual situation offered him, and each might be fairly required to stand within his own right. None but those who were actual creditors, in legal contemplation, at the time, had a right to compete. The one who has the best legal right is to be preferred and advanced. It cannot well be doubted that, but for the false and misleading affidavit of *Bartels*, the plaintiffs would have secured the precedence sought by their intervention. They ought in this action to obtain the ad-

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vantage of which they were defeated by that deception. That was not permissible strategy.

By the Court.— The judgment of the superior court of Milwaukee county is reversed, and the cause remanded with direction to render judgment for the appellants for the relief demanded in the complaint.

GOLDSMITH, Respondent, vs. SOUTHWELL, Appellant.

January 13 — February 2, 1897.

Lease, how construed.

A provision in a lease for an office of a corner room facing on both W. and J. streets in a building at the intersection of those streets, that "if the lessor should, during the term of this lease, rent any office on either the W. or J. street front, for a less rate than . . . one dollar per square foot on the J. street front, or one dollar and twenty-five cents on the W. street front, or one dollar and fifty cents per square foot on corner rooms located on the corner of W. and J. streets, . . . such reduction shall also be made to the lessee for the term of this lease, . . . this agreement shall not apply to any room not specially mentioned," is to be construed as dividing the rooms into three classes, and making the reduction of the lessee's rent to depend upon the lessor's reducing the rent on rooms of the same class, that is, on corner rooms.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

Action to recover a balance alleged to be due for rent. Plaintiff owned a building known as the Goldsmith Building, located at the corner of Wisconsin and Jefferson streets, in the city of Milwaukee, Wisconsin. By written contract, on the 1st day of May, 1893, he leased to the defendant rooms Nos. 408 and 409 in such building, for the term of five years, for $991 per year. Defendant answered, setting up that there was a stipulation in the lease that, in case the

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lessor should, during the term of the lease, rent any office room fronting on either Wisconsin or Jefferson streets at less than $1 per square foot on Jefferson street front, or $1.25 per square foot on Wisconsin street front, or $1.50 per square foot for rooms on the corner and fronting on both streets, . . . the same reduction should be made to the defendant for the term of his lease; that plaintiff did rent rooms on the Jefferson street front as low as 78.6 cents per square foot, and on Wisconsin street as low as 93.75 cents per square foot. On such alleged facts defendant claimed a reduction in amount of rent claimed for the period covered by the complaint, and counterclaimed for excess of rent theretofore paid. On the trial defendant proved, among other things, that plaintiff rented a room on Wisconsin street for three years, and that, some time after the lease was made, the term was reduced to one year, and the tenant permitted to settle for that year by paying nine months' rent, or at the rate of ninety-five cents per square foot.

At the close of the evidence there were no disputed facts. The case turned wholly upon whether the defendant was entitled to a reduction of the rent charged under the lease for a corner room by reason of the fact that plaintiff had rented a room on Wisconsin street, as before stated. On this question the trial court decided in favor of plaintiff, and directed a verdict accordingly for the amount due under the lease as claimed in the complaint, less some reduction for a room on Jefferson street, in regard to which there was no dispute. The defendant excepted to the finding of the court construing the lease as stated. Judgment was rendered in favor of the plaintiff, from which this appeal is taken.

For the appellant there was a brief by *Bottum & Chadbourne*, attorneys, and *Lewis M. Ogden*, of counsel, and oral argument by *Mr. Ogden*.

For the respondent the case was submitted on the brief of *Monroe & Richardson*.

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MARSHALL, J. The language of the lease on which the question here presented arises is as follows: "In case the lessor should, during the term of this lease, rent any office on either the Wisconsin or Jefferson street front at a less rate than now demanded, to wit, one dollar per square foot on the Jefferson street front, one dollar and twenty-five cents per square foot on the Wisconsin street front, and one dollar and fifty cents per square foot on corner rooms located on the corner of Wisconsin and Jefferson streets, . . . such reduction shall also be made to the lessee for the term of this lease, but . . . this agreement shall not apply to any rooms not specially mentioned." Appellant had a corner room. The question is whether, under the above provision, he was entitled to a reduction in the rent of such corner room because a Wisconsin street room, in the class rated at $1.25 per square foot, was rented at a less rate, conceding that it was so rented. Appellant invokes the familiar rule that a contract should be so construed, if possible, as to give effect to all its parts, and contends that, unless the reduction of the rent charged for a room in the $1.25 class calls for a corresponding reduction in the rent of the corner room, the contingency mentioned, upon the happening of which the rent of such corner room would be reduced, could never happen, as he had no other room fronting on Wisconsin street. But, as we read the lease, another rule, quite as well established as the one invoked by counsel, applies; i. e. that, where the language is plain and unmistakable, there is no room to apply the rules for judicial construction. The language of the lease under consideration appears to clearly mention three classes of rooms, and to provide that if, subsequent to the date of the lease, the lessor should rent a room belonging to one class at a less rate than that charged to the lessee, such lessee should be entitled to a corresponding reduction in any similar room covered by his lease. The last words of the clause are significant: "The provision in regard to the reduction of rent shall apply

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only to rooms specially mentioned." That was intended unmistakably to emphasize what precedes it, that the reduction of the rent of a room in one class should not affect the rent of any room covered by the lease not strictly in such class. The foregoing requires an affirmance of the judgment whether there was in fact a reduction of the rent of a Wisconsin street room or not.

By the Court.— Judgment affirmed.

SLENSBY, by guardian *ad litem*, Respondent, vs. THE MILWAUKEE STREET RAILWAY COMPANY, Appellant.

January 13 — February 2, 1897.

Negligent injury to child by street car: Improper remarks by counsel.

1. In an action for an injury to a boy two years and seven months of age, by being run over by a street car, the evidence showed that, in some unknown way, he escaped from the yard at his home and started to cross the street in which the railway ran,— at first going behind a coal wagon moving north, and then passing from behind it towards home; that he was struck and injured by a street car about one hundred feet south from the coal wagon and fifteen to twenty feet west from the line of the wagon; that there was nothing within that distance to obstruct the vision of the motorman except one trolley post; that the boy was clearly seen by passengers on the car from the time that he started to cross the street, both before and after he was behind the coal wagon; and that the motorman's attention was called to the boy when he was about fourteen feet from the car, but he did not put on the brake. *Held*, that there was sufficient evidence to support the finding that the motorman ought to have seen the boy in time to have avoided the accident, notwithstanding he testified that he did not see him until he was going under the wheels; and also to sustain the finding that the boy's mother was free from contributory negligence.
2. Improper remarks made by counsel for the plaintiff in addressing the jury, in respect to the reasons why a second trial of the case became necessary, *held* not sufficient ground for disturbing the verdict, where, on objection being made, the jury were instructed to disregard them.

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Slensby vs. The Milwaukee Street R. Co.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

The case is fully stated in the opinion.

For the appellant there was a brief by *Miller, Noyes, Miller & Wahl*, and oral argument by *George H. Wahl.* They contended that there was no evidence of negligence on the part of defendant, and that the motorman simply failed to choose the best method of avoiding the accident. *Baker v. Eighth Ave. R. Co.* 62 Hun, 39; *Bishop v. Belle City St. R. Co.* 92 Wis. 139.

For the respondent there was a brief by *Toohey & Gilmore*, attorneys, and *Quarles, Spence & Quarles*, of counsel, and oral argument by *John Toohey* and *J. V. Quarles.*

CASSODAY, C. J. This action is to recover damages for being run over by a street car of the defendant. The complaint is in the usual form in such cases. The answer consists of admissions and denials. At the close of the trial, the jury returned a special verdict in favor of the plaintiff, and, from the judgment entered thereon, the defendant brings this appeal.

There is undisputed evidence to the effect that, at the time mentioned, Orchard street, in Milwaukee, ran east and west, and was about sixty-five feet wide, including sidewalks; that Clinton street ran north and south, and crossed Orchard street at right angles; that immediately south of Orchard street, and west of Clinton street, there was a store having a front on Clinton street of about sixteen feet, and running back on the line of Orchard street a distance of forty-nine feet; that south of that store, and about three feet from it, was a double house, having a front on Clinton street, and flush with it, of about thirty feet, and running back thirty-six feet; that between that double house and the store mentioned was a passageway about three feet wide, kept closed by a gate; that immediately south of the double house, and

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between it and a cottage, was a narrow passageway, kept closed by a gate; that the parents of the plaintiff, at the time in question, lived in the south half of the double house, and their children were in the habit of playing in the back yard, which was usually kept closed by gates; that Clinton street was seventy-six feet wide, including sidewalks, and fifty-two feet wide between the sidewalks; that on the east side of Clinton street, and 125 feet south of the south line of Orchard street, there was a grocery store; that the north line of that store was about seventy-five feet south of the south line of the double house projected; that the defendant's street-car line was located on Clinton street,— having double tracks thereon; that the sidewalk on each side of that street was twelve feet wide; that between each sidewalk and the nearest rail was about seventeen or eighteen feet; that each railway track was less than five feet wide, and that the distance between the two tracks was about five feet; that between the two tracks and about fifty feet south of Orchard street was a trolley post,— the same being in line with the south line of the double house projected; that about ten or eleven o'clock on the forenoon of July 12, 1894, the plaintiff, who was at that time about thirty-one months of age and still wore dresses, had escaped from his home in some way not accounted for, and was seen at the front of the grocery store on the east side of Clinton street, mentioned, in the act of climbing down from the sidewalk into the street; that just then a team drawing a coal wagon, with three tons of coal thereon, came from the south on the east side of the east track; that at first the little boy, "*Leo*," as he was called, started to cross the street, and go towards his home, in front of the coal team, but suddenly stopped, and then proceeded to cross from behind the coal wagon, and continued to go in the direction of his home until he reached the west car track, when he was struck by a car running south on that track, at a point about sixty-six feet south of

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Orchard street, and about seventeen feet south of the trolley post, and about seventy feet from the northwest corner of the grocery store where he was first so seen.

The special verdict is to the effect that the mother of *Leo* exercised ordinary care and prudence in taking care of him, and preventing him from going on the street upon which he was injured; that it was dangerous for a child of his age to go unattended upon and across the street, with cars passing and repassing; that the motorman, by the exercise of ordinary care, ought to have seen *Leo* in time to have avoided the accident; that the failure of such motorman to see him in time to have avoided the accident was not the proximate cause of the injury; that the motorman, after he saw *Leo*, did not use such means to prevent the injury as a motorman of ordinary care and prudence would have used under the same circumstances; that such omission on the part of the motorman was the proximate cause of the injury; that the brake of the car in question was not out of repair at the time of the accident to such an extent that the car could not be stopped by a motorman in the exercise of ordinary care and prudence, within the usual and ordinary time and distance; that the defendant was guilty of a want of ordinary care, which was the proximate cause of the injury; that they assessed the plaintiff's damages at $11,000.

The motorman testified, among other things, to the effect that his motors were good; that, when he was north of Orchard street crossing, he saw some children playing in the gutter and on the sidewalk, on the west side, and that he then was going about six miles an hour, and immediately cut off the power, and let the car drift; that he passed the coal wagon just about at the trolley post; that he noticed a little girl on the west side, motioning with her hands; that he glanced to the east, and saw *Leo* on the rail, going under the car; that he immediately set his brake, but did not reverse his motor, because *Leo* had dresses on, and that, if he

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got caught in the gear, he would have been mangled, and in going at that speed there was a chance for stripping the gear. The driver of the coal wagon, among other things, testified to the effect that he heard the alarm as the car was passing him, and that he looked around, and that *Leo* was eighteen or twenty feet from the car; that he then stopped his wagon, so that the front feet of his horses stood on the south corner of Orchard street; that his team and wagon were about twenty-six feet in length. According to his testimony, his wagon must have gone a distance of nearly 100 feet while *Leo* went from the rear of the wagon to the point where he was struck by the car. The team and wagon moved north on a line some fifteen or twenty feet east of the east rail of the track on which the car was moving south, and within that space the vision of the motorman was necessarily unobstructed, except by the trolley post, and that such space necessarily broadened as the wagon moved north, and the car moved south. The testimony of ladies on the car tended to prove that, at or before crossing Orchard street, they saw *Leo* when passing from the sidewalk to the street in front of the grocery store, and they afterwards saw him in the street, after he passed from behind the wagon, and between the east track and the east curb of the street.

There is plenty of evidence to support the finding that the motorman ought to have seen *Leo* in time to have avoided the accident, but they found that his failure to see him earlier was not the proximate cause of the injury. They failed to find just where *Leo* was with respect to the car when the motorman first saw him; but they do find that, after he did see him, he failed to exercise ordinary care to prevent the injury, and that such failure was the proximate cause of the injury. This finding is, as we think, supported by the evidence. There is evidence tending to prove that *Leo* was about fourteen feet from the car when the little girl mo-

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tioned to the motorman as he testified. Certainly, the jury were not bound to accept the motorman's statement as to just where *Leo* was when he first saw him, regardless of the other evidence and circumstances in the case. *Jambor v. State*, 75 Wis. 669 *et seq.*

The finding of the jury to the effect that *Leo's* mother was free from contributory negligence seems to be supported by the evidence. This being so, the question of imputed negligence is not in the case.

There was no error in refusing to submit to the jury the question whether the back yard of the house of *Leo's* parents was sufficiently inclosed to prevent his escape. It was an evidentiary fact at most, properly to be considered in determining the question of the mother's contributory negligence.

Exception is taken because, in closing the argument, counsel for the plaintiff used the following language: "As the evidence shows, this is the second time we have appeared in behalf of this unfortunate little sufferer, and the reason why we are here now was that an incautious and careless answer was made by the jury, who all the time intended to look after and protect the rights of both parties. They were honest. They simply made a mistake in answering a question in this special verdict, which the technicality of my friend renders necessary. There is a chance, you know, that a jury may answer the questions so as to furnish a loophole for the railroad company, and that is why they want a special verdict. Now, I will ask you to exert great care and discrimination, as I know you will, in answering these questions, because we do not wish for a third time to be obliged to come to a jury to establish a contention as plain and free from difficulty as this is." As soon as the defendant excepted to the remarks quoted, the court said: "So far, gentlemen of the jury, as any remarks were made by plaintiff's counsel as to the reason why a second trial of this case became necessary, those remarks you will disregard entirely, and con-

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sider as not made in the case." Besides, it appears that the counsel for the defendant, in addressing the jury, had already discussed at length the fact that corporations were unpopular with juries, and the reasons therefor. The province of counsel in such matters has frequently been stated by this court, and it is unnecessary to repeat them here. *Baker v. State*, 69 Wis. 40; *Barczynski v. State*, 91 Wis. 415.

By the Court.— The judgment of the superior court of Milwaukee county is affirmed.

LEHMANN, Appellant, vs. FARWELL and others, interpleaded, Respondents and Appellants.

January 13 — February 2, 1897.

Assignment: Survival of action: Garnishment.

1. A cause of action for a personal injury through negligence is one which, under ch. 280, Laws of 1887, amending sec. 4253, R. S., survives, being clearly within the meaning of the amendatory clause, "of other damage to the person," and it is therefore assignable before judgment. The assignment, in this case, of a verdict for such an injury by the plaintiff to his wife is sustained to the extent of his actual indebtedness to her.
2. A mere verdict against the defendant in an action for personal injury does not make the liability absolute, which is essential to render it subject to garnishment. To become so liable a judgment is necessary.

APPEALS from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

This is a garnishee action. The facts were largely stipulated, and are as follows: On the 24th day of May, 1893, the main defendant, Hubert Deuster, obtained a verdict for $1,500 against the garnishee defendant, the Milwaukee Street Railway Company, in an action to recover for per-

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sonal injuries. Judgment was not entered on said verdict until the 20th day of June following. That judgment was affirmed by this court on appeal in January, 1895; and on the 25th day of May, 1895, the garnishee paid the sum, by depositing the amount thereof in court, amounting at that time to $1,751.51. On the 16th of March, 1893, the plaintiff, *Henrietta Lehmann*, commenced an action for unpaid rent against the defendant Deuster, and, on the 25th of May following, commenced another action for another instalment of unpaid rent. In connection with these two actions the plaintiff commenced garnishee proceedings against the street-railway company, by the service of the necessary papers, on the 25th day of May, 1893, which was the day following the rendition of the verdict in the case of Deuster against the railway company. The garnishee answered, denied liability, and subsequently amended its answer and set forth the judgment. On the 22d day of June, 1893, two days after the rendition of the judgment in the case of Deuster against the railway company, the intervening defendants, *Farwell* and others, composing the firm of Farwell & Co., commenced an action against Deuster for the recovery of more than $800, and served garnishee process on the railway company. The garnishee answered, and set up the fact of the recovery of the Deuster judgment, and also the other garnishments above referred to. On the 6th day of December, 1894, the intervening defendant, *Sweet, Dempster & Co.*, commenced an action against Deuster to recover more than $400; and on the 14th day of January, 1895, it also commenced garnishment proceedings against the railway company, in which the garnishee duly appeared and answered in substantially the same form as in the Farwell case.

After the affirmance of the Deuster judgment against the street-railway company, in this court, all of the garnishee creditors obtained judgments against Deuster. The plaint-

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iff's (*Lehmann's*) judgment amounted to nearly $500; Farwell & Co.'s judgment, to nearly $1,000; *Sweet, Dempster & Co.'s*, to a little more than $400. All of the garnishing creditors above named were brought into this action, by proper proceedings, after the garnishee defendant had paid into court the amount of the judgment obtained against it by Deuster; and about the same time, also, one *Caroline A. Deuster*, the wife of Hubert Deuster, was made a party to these proceedings on her own petition,—she claiming to own the right of action or judgment against the street-railway company recovered by her husband, by virtue of an assignment of the same which was made and delivered to her by her husband on the 25th day of May, 1893, being the same day the verdict was rendered, and before any garnishment papers had been served. The parties agreed that one third of the moneys paid into court by the street-railway company belonged to Messrs. Austin & Hamilton, the attorneys of Hubert Deuster in that litigation, and accordingly the amount so agreed to be due was paid to that firm; leaving in the hands of the clerk of the superior court the sum of $1,113.08, which is the subject of this litigation.

The court found substantially the facts as previously stated, and found that Hubert Deuster owed his wife, *Caroline A. Deuster*, at the time of the attempted assignment of his right of action, the sum of $622, and that she had the first lien to that amount; that the defendants John V. Farwell & Co. had the next lien; and, there not being sufficient funds to pay the entire amount of the *Farwell* claim, no disposition was made of the claim of *Sweet, Dempster & Co.* It was further adjudged that at the time of the service of the plaintiff's garnishee process the garnishee was not indebted to Hubert Deuster in any sum. From this judgment the plaintiff, *Henrietta Lehmann*, appealed, the defendant *Caroline A. Deuster* appealed, and the defendants John V. Farwell & Co. appealed.

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For the plaintiff there were briefs by *Sylvester, Scheiber, Riley & Orth*, and oral argument by *M. M. Riley* and *F. Scheiber*. They contended, *inter alia*, that there was a present subsisting liability on the part of the railway company to Deuster when the garnishee papers were served, enforceable at law and evidenced by the judgment, and that such liability had become absolute by the judgment before this appellant's judgment against Deuster was rendered, so that under our statute (sec. 2768, R. S.) she acquired a valid lien by her garnishment proceeding. *Jones v. St. Onge*, 67 Wis. 520; *Foster v. Singer*, 69 id. 392, 395. The rule under the Massachusetts statute, from which ours is mainly copied, is changed in that respect by sec. 2769, S. & B. Ann. Stats. The liability of the railway company became liquidated when the verdict was rendered, and it was then garnishable. *St. Joseph Mfg. Co. v. Miller*, 69 Wis. 389; *Crouch v. Gridley*, 6 Hill, 250.

Julius E. Roehr, for the defendant *Caroline A. Deuster*, contended that the cause of action against the railway company, being one that survives in case of death, was assignable before judgment. *Hiner v. Fond du Lac*, 71 Wis. 74, 81; *Cotter v. Plumer*, 72 id. 476, 478.

For the defendants *Farwell & Co.* there was a brief by *Haring & Frost*, and oral argument by *C. J. Haring*.

Winslow, J. An action for personal injuries resulting from negligence was tried, and a substantial verdict rendered for the plaintiff. Before judgment on the verdict, the plaintiff assigned his right of action to his wife; and later, upon the same day and still before the entry of judgment, garnishee process was served on the defendant, at the suit of one of the plaintiff's debtors. The crucial questions in the case are simply (1) whether, before judgment, the cause of action was assignable; and (2) whether, before judgment, the defendant could be effectively garnished.

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1. If the cause of action survived it was assignable. *Webber v. Quaw*, 46 Wis. 118. It is well understood that such an action does not survive at common law; hence the question is whether it survives under sec. 4253, R. S., as amended by ch. 280, Laws of 1887. That section reads as follows, the amendments of 1887 being printed in italics: "In addition to the actions which survive at common law, the following shall also survive, that is to say; actions for the recovery of personal property or the unlawful *withholding and* conversion thereof, actions for assault and battery or false imprisonment, *or other damage to the person*, or for goods taken and carried away, and actions for damages done to real and personal estates. *All equitable actions to set aside conveyances of real estate, or to compel a reconveyance thereof, and all actions for a specific performance of contracts relating to real estate.*" The question whether the section, as changed by the act of 1887, includes a cause of action for personal injuries resulting from negligence, has not been decided by this court. It was raised in *Hiner v. Fond du Lac*, 71 Wis. 74, but expressly left undetermined. Under a statute in almost identical terms, in Massachusetts, such a cause of action was held to be included. *Norton v. Sewall*, 106 Mass. 143. It was there said that the words "include every action the substantial cause of which is bodily injury." See, also, *Cutter v. Hamlen*, 147 Mass. 471. The language of the Massachusetts statute was, "actions of replevin, of tort for assault, battery, imprisonment, *or other damage to the person.*" The only difference in the two sections which is material to the present inquiry is that the Massachusetts statute rather unnecessarily refers to the action as a "tort action." This adds nothing and takes away nothing from the meaning of the words. It does not seem to us that there is any room for mere construction. The words of the statute are plain. They are to the effect that an action for assault and battery, false imprisonment, or other damage to the person, shall

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survive. The injury resulting from being run over by a street car is certainly "other damage to the person," and it is damage of the same character as the damage resulting from an assault and battery; that is, it is physical pain and suffering. We are referred to no other statutes of this character, save the Massachusetts statute. The amendment of 1887 incorporated the words of that statute in our own after they had received a construction there. It might be argued that we took the law with the construction. But whether this be so or not, the construction seems to us entirely reasonable and logical, and we adopt it.

The cause of action being assignable before judgment, the only remaining question in regard to the claim of *Mrs. Deuster* was whether she received the assignment in good faith, for a *bona fide* indebtedness. On this we find sufficient evidence to justify the findings of the trial judge; and we shall not disturb them, either on her appeal, or on the appeals of the other appellants.

2. The second question is whether a mere verdict in a purely tort action creates a liability which can be garnished. The garnishee is not liable unless at the time of the service of process his liability to the principal defendant is absolute. R. S. sec. 2768; *Vollmer v. C. & N. W. R. Co.* 86 Wis. 305. The question of liability or not is fixed at the time of the service of process, and it must then be absolute, though perhaps payable subsequently. If, however, the liability is contingent on a future, uncertain event, it is not subject to garnishment. *Edwards v. Roepke*, 74 Wis. 571; *Dowling v. Lancashire Ins. Co.* 89 Wis. 96. A mere claim for personal injuries is not the subject of garnishment. *St. Joseph Mfg. Co. v. Miller*, 69 Wis. 389. The verdict does not turn it into a debt, nor into an absolute liability. That must be done, if at all, by the judgment. No matter how long a verdict remained on the records of the court, no action could ever be maintained upon it. *Thayer v. Southwick*, 8 Gray,

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229; Rood, Garnishment, § 152. The case of *Jones v. St. Onge*, 67 Wis. 520, is claimed to support the contrary doctrine. While there may be language in the opinion in that case which would tend to support the theory that a mere verdict in a tort action is subject to garnishment, the case itself was evidently rightly decided upon another ground. In that case the garnishee had been sued in replevin for certain logs by the main defendant, and the verdict rendered was that St. Onge, the main defendant, was the owner of the logs, and that the garnishee unlawfully withheld possession of them, and fixed their value. After verdict and before judgment, the garnishment papers were served. It was plainly a proper case for garnishment, because the garnishee had property of the main defendant in his hands, or was indebted to him therefor, at the time process was issued. In fact, the verdict neither helped nor hindered the liability of the garnishee. He would have been liable had no suit been pending at all, because he had property of the main defendant in his hands at the time the garnishee process was served, or was indebted to the main defendant to the amount of the value of such property. So far as the *St. Onge Case* seems to justify the doctrine that a mere verdict in an action to recover damages for personal injuries is the subject of garnishment, we cannot follow it. It follows that the plaintiff's garnishment must fail, because she garnished after verdict and before judgment, and the Farwell & Co. process becomes the first lien upon the moneys in court after the claim of *Mrs. Deuster* is paid. These were the conclusions reached by the court below.

By the Court.—Judgment affirmed.

The assignability of a cause of action for personal tort is treated in a note to *Hunt v. Conrad* (47 Minn. 557), in 14 L. R. A. 512.—REP.

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THE MILWAUKEE TRUST COMPANY, Receiver, and another, Appellants, vs. THE LANCASHIRE INSURANCE COMPANY and others, Respondents.

January 14 — February 2, 1897.

Insurance: Condition against change of title or possession.

A condition in a policy of insurance that, unless by agreement indorsed thereon, such policy shall be void "if any change, other than by the death of the assured, take place in the interest, title or possession of the subject of the insurance (except change of occupants, without increase of risk), whether by legal process, or judgment, or by voluntary act of the insured, or otherwise," is broken and the policy is rendered void by the voluntary assignment of the insured property by the insured for the benefit of creditors, and possession by the assignee, without the consent of the insurer, even though such assignment is void as to creditors for fraud, or for noncompliance with the requirements of the statutes on that subject. Such assignment, though void as to creditors, is valid as to all others.

APPEAL from a judgment of the superior court of Milwaukee county: R. N. AUSTIN, Judge. *Affirmed.*

This was an action on seventeen separate insurance policies, set out in the pleadings, issued to George Enger and August Kress, partners, doing business under the firm name of Enger, Kress & Co., on or about July 29, 1893, upon their certain real estate and appurtenances, machinery, and appliances, patterns, stock in trade, manufactured and in process of manufacture, etc., etc., all described in six items. These several companies were all joined in one action, under ch. 235, Laws of 1893. On October 14, 1893, said Enger and Kress assigned, set over, and conveyed to the Enger-Kress Company, a stock corporation organized under the laws of Wisconsin, and its successors and assigns, all the said property so insured; and it was alleged that it remained the absolute owner thereof until after its total destruction by fire,

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July 7, 1894, the total value thereof being $44,816, and the total amount of insurance thereon by said companies, under their separate policies, was $38,750, and that each of said companies was interested in the loss. It was further alleged that in an action in the circuit court for Milwaukee county, by John Barth against the Enger-Kress Company, judgment was given in favor of said Barth, and against such company, for $66.45, which was docketed, and upon which execution had been issued and returned unsatisfied, and that thereupon, by an order and judgment entered and given in that action July 14, 1894, the stock, credits, effects, and things in action of said Enger-Kress Company were sequestered, and the said plaintiff was duly appointed receiver of said company, and of its stock, property, things in action, etc., and was by such order authorized to exercise the usual and ordinary powers of receivers, and to bring all actions at law and suits in equity necessary or convenient for the collection and preservation of the property of said company; that it accepted said trust, and qualified as such receiver, and was still acting in that capacity, and, as such, brought the present action. *Hannah Langlois* was joined with it, as coplaintiff, by reason of an interest under said Enger-Kress Company in the real estate and policies mentioned. The several counts contained the usual averments as to the issuing of the policies to Enger and Kress, the due assignment and transfer of the same to the Enger-Kress Company, and that the defendant, in the case of each policy, by an indorsement in writing thereon, signed by its authorized agent, assented to the assignment and conveyance of said property, and the assignment and transfer of said policy to the said Enger-Kress Company; and the plaintiff claimed, as such receiver, to be the lawful owner and holder of the demand upon each of said policies for said loss; that they were each in force at the time of the fire; and that notice had been given of the loss, and proofs had been furnished, etc., etc.;

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and judgment was demanded for the amount of each of said policies, against the company issuing it.

On behalf of the defendant the *Lancashire Insurance Company*, and fourteen other companies defendants, as shown by the record, after answering the complaint against them, it was alleged, in substance, that each of said policies, "unless otherwise provided by agreement indorsed thereon, or added thereto, should be void . . . if any change, other than by the death of the insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants, without increase of hazard), whether by legal process or judgment, or by voluntary act of the insured, or otherwise," and that contrary to the stipulations and conditions of each of said policies, without any provision by agreement indorsed thereon or added thereto otherwise providing, the following facts existed: That a change took place in the interest, title, and possession of the entire subject of insurance (other than a change of occupants, without increase of hazard), in that about fifteen days prior to the fire in said complaint referred to, and about twenty-one days prior to the time of the appointment of the plaintiff as such receiver, said Enger-Kress Company, pursuant to chapter 80 of the Revised Statutes of Wisconsin, as amended, and on the 22d day of June, 1894, duly made a voluntary assignment and transfer of all its property and effects, including each of said policies of insurance and the property covered thereby, to one E. B. Winterhalter, who then was, and still is, a resident of said state, and who, before taking possession of the property so assigned and before taking upon himself any trust conferred upon him by the instrument of such assignment, duly accepted said trust, and duly qualified as required by law; that on or about the 23d day of June, 1894, an order was duly made by the circuit court for Milwaukee county, in the matter of said voluntary assignment, authorizing said assignee to continue the business of said assignor, the Enger-

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Kress Company; and that, pursuant to said voluntary assignment and said order of said court, said assignee, as such, acquired all the interest in, and title to, and entered into the possession of, all the property and effects of said Enger-Kress Company, including the six items of property described in each of said policies, and in said complaint specifically set forth, and thereafter, as such assignee, continued said business, and so held the title and possession of said property described in each of said policies, up to and at the time of the fire in said complaint referred to, to wit, July 7, 1894. Two of the defendants, namely, the Detroit Fire & Marine Insurance Company and the Germania Insurance Company of New Orleans, made default.

At the trial of the issues joined, before the court and jury, after the plaintiffs had produced evidence tending to support the allegations of their complaint, and had rested, the defendants, who had answered the complaint, put in evidence the voluntary assignment, without preferences, by the Enger-Kress Company to E. B. Winterhalter, dated June 22, 1894, executed under its corporate seal, by its president and secretary, in the presence of two subscribing witnesses, and acknowledged before a notary public, together with a written acceptance, indorsed upon a copy thereof, by said Winterhalter, of the trusts specified in said assignment, and certifying that said copies were true and correct copies of the originals. The proper certificate by a court commissioner was also indorsed thereon, to the effect that the said assignee did, in his presence, make said indorsement thereon, as required by sec. 1696, R. S., which was dated June 23, 1894. Said copy of said assignment was filed and recorded in the office of the clerk of the circuit court, in the county of Milwaukee, on the 23d day of June, 1894, at which time the bond of said assignee in the penal sum of $63,500, with the American Surety Company as surety, was also filed by the said Hugh Ryan, court commissioner, together with a

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certificate indorsed thereon, to the effect that said assignee, before taking possession of the property assigned and before taking upon himself any of the trusts conferred upon him by the instrument of assignment, did deliver to said commissioner the said bond duly executed, and that said surety duly satisfied him that it had complied with the law and had the right to execute said bond, and that each of said sureties was a freeholder of this state; and said commissioner further certified thereon, over his signature, that he was not a creditor of said assignor, and that he approved the within bond, as to amount, sureties, manner of execution, and sufficiency, June 23, 1894. Attached to the assignee's bond and forming a part thereof, was a certificate of the commissioner of insurance, which, it was claimed, was defective and insufficient, and failed to show that the said American Surety Company, the surety in the said bond, was qualified, and had the right, under the statute, to become surety on said bond, pursuant to the statute, and which certificate appeared, in its date, to have been altered from the 10th day of April, 1894, to the said 23d day of June in the same year; and it was claimed on behalf of the plaintiff that the defects rendered the bond and assignment in question void.

The defendants also put in evidence the petition of the said assignee, and the order of the circuit court for Milwaukee county, dated June 23, 1894, directing the said assignee to continue the business of the assignor, until the further order of the court, for the purpose of completing all outstanding contracts, and for converting into marketable condition the partially unmanufactured stock, and authorizing him to purchase from time to time such articles as might be needed, and to put such unmanufactured stock into marketable condition. On June 27, 1894, the court ordered the assignee to pay over to August Kress the sum of $325, the amount of a special deposit made by him with the assignor

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prior to the assignment. It appeared that the assignee, Winterhalter, failed to file the inventory of the property assigned, and list of creditors, within the time prescribed by the statute, July 13, 1894, being the last day on which to file the same; and, upon his petition and rendition of his account, his report, as assignee, to the circuit court, was confirmed, and said receiver was ordered, December 8, 1894, to pay him the sum of $515.38, due for his services and disbursements as such assignee, and which was paid accordingly on the same day.

It further appeared that said assignment was made pursuant to a resolution passed by the board of directors of the Enger-Kress Company, at a meeting June 22, 1894, a record of which was produced; and it was shown that claims had been filed by various creditors in the assignment proceeding prior to July 14, 1894, to the amount of $2,884.19. Defendants produced in evidence the petition of the plaintiff in the sequestration proceeding, stating that said Winterhalter then held the property, books of account, bills receivable, and things in action of the defendant therein, the Enger-Kress Company, and refused to deliver them to the petitioner; claiming a right to hold them for fees and disbursements, under a pretended assignment made by the defendant prior to the appointment of the petitioner as receiver.

At the conclusion of the evidence, the court directed a verdict in favor of the plaintiffs, and against each of the insurance companies named, for the respective amounts claimed, with the understanding and stipulation on the part of both parties that if the court should come to the conclusion, on the question of law, that the plaintiffs ought not to recover, then that the court would be at liberty to set aside the verdict, and order a judgment in favor of the defendants. The court subsequently, after hearing arguments on the questions of law, set the verdict aside, and ordered

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judgment dismissing the complaint upon the merits, as against all the defendants except the Detroit Fire & Marine Insurance Company and the Germania Insurance Company of New Orleans, which were in default, and against which judgment was to be rendered for the amounts claimed to be due from them, and that the other defendants recover of the plaintiffs their costs to be taxed. Judgment was entered accordingly, and the plaintiffs appealed from the portion thereof rendering judgment against them, and in favor of the defendants aforesaid.

For the appellants there were briefs signed by *Timlin & Glicksman*, and oral argument by *W. H. Timlin*. They argued, *inter alia*, that the condition of the policies was not broken, because the change of title or interest was incomplete and invalid. *Gerling v. Agricultural Ins. Co.* 39 W. Va. 689; *Commercial U. Ass. Co. v. Scammon*, 126 Ill. 355; *Pitney v. Glens Falls Ins. Co.* 65 N. Y. 6; *School Dist. v. Ætna Ins. Co.* 54 Me. 505; *S. C.* 62 id. 330; *Newman v. Springfield F. & M. Ins. Co.* 17 Minn. 123; *Appleton Iron Co. v. British Am. Ass. Co.* 46 Wis. 23; *Alkan v. N. H. Ins. Co.* 53 id. 136, 149; *Keeney v. Home Ins. Co.* 71 N. Y. 396; *Georgia Home Ins. Co. v. Bartlett*, 91 Va. 305; *Kitterlin v. Milwaukee M. & M. Ins. Co.* 134 Ill. 647; *Watertown Ins. Co. v. Grover & B. S. M. Co.* 41 Mich. 131; *Judge v. Conn. F. Ins. Co.* 132 Mass. 531; *Taylor v. Merchants & B. Ins. Co.* 83 Iowa, 402; *Mosconi v. Burchinell*, 7 Colo. App. 433; *Farwell v. Webster*, 71 Wis. 485, 487.

For the respondents there was a brief by *Van Dyke & Van Dyke & Carter*, attorneys, and *George H. Noyes*, of counsel, and oral argument by *Mr. Noyes*, *Mr. W. D. Van Dyke*, and *Mr. M. H. Beach*.

PINNEY, J. In the view which we feel compelled to take of this case, it will be necessary to consider but one of the several defenses insisted on by the several insurance com-

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panies who have answered and actively defended this action. We think that the fifteen policies severally issued by the companies referred to were avoided by the operation and effect of the voluntary assignment, executed and delivered by the insured, the Enger-Kress Company, to the assignee, Winterhalter, and accepted by him, about two weeks before the fire that caused the loss, and which embraced all the property insured by said policies, and was without the stipulated consent of those companies, and that there can be no recovery on either of them. The assignment delivered to, and so accepted by, the assignee, and filed, with the accompanying papers, in the office of the clerk of the circuit court, June 23, 1894, became a valid and operative instrument of conveyance and transfer of the legal title to the property covered by the policies, as between the Enger-Kress Company, the insured, and the assignee, and therefore effected a change in the interest, title, and possession of the property insured, without the consent of the insurers; and when the fire occurred, July 7, 1894, these policies had thus been avoided, and were of no force or effect. It is clear, also, that the assignee had before then taken actual possession, and, as such, had been for some days engaged in the performance of his duties as such assignee. It is a proposition well established by the great weight of authority that an assignment, though void as against creditors, is valid as between the immediate parties, and the assignor is estopped by his own deed. Burrill, Assignments, § 323. The assignor, having no title thereafter to the property assigned, could not convey or assert any. None but creditors could question the title thus acquired by the assignee. *Haines v. Campbell*, 8 Wis. 187; *Estabrook v. Messersmith*, 18 Wis. 545; *Geisse v. Beall*, 3 Wis. 367; *Lincoln v. Cross*, 11 Wis. 91; *Fargo v. Ladd*, 6 Wis. 106; *Wilson v. Marion*, 147 N. Y. 589, 593; *Knower v. Central Nat. Bank*, 124 N. Y. 559. The fact that the assignor did not make and file in the office

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of the clerk of the circuit court a correct and verified inventory of his estate, and a list of his creditors, certified by the assignee, as provided by sec. 1697, S. & B. Ann. Stats., can make no difference as to the validity of the assignment, for a failure to comply with this section would not avoid the assignment. *Cribben v. Ellis*, 69 Wis. 337; *Appeal of Howland* (N. H.), 35 Atl. Rep. 943. If, as contended by the plaintiffs, the bond of the assignee was fatally defective, this would render the assignment void only as to creditors, but would not prevent it from being operative between the parties, so as to vest the title in the assignee. The cases of *Wadleigh v. Merkle*, 57 Wis. 517; *Fuhrman v. Jones*, 68 Wis. 497; and *Grever v. Culver*, 84 Wis. 295, go no further than to hold that, until a proper bond has been given, approved, and filed, the assignee would acquire no rights to the property assigned, *as against* the attaching creditors of the assignor.

The statute (R. S. sec. 1694) declares the effect of a failure to give a bond, with sufficient sureties, to be that the assignment "shall be void as against the creditors of the person making the same," leaving it, by necessary implication, operative as between the parties. The instrument contains apt and proper words to pass the entire legal title to the property described in it, and covered by the policies, and provides that the assignee "shall take possession of the property hereby assigned, or intended so to be, and shall with all convenient diligence proceed to sell and dispose of the same, as is provided by law, and convert the same into money," and collect all debts, dues, etc.; and it directs the application that is to be made of the proceeds, namely, to the payment of the costs and expenses of executing the trust, and the payment of the creditors of the assignor. We think that the assignment was valid and operative, so far, at least, that the assignor could not reclaim or recover back the property assigned, from the assignee. Whether the as-

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signment is void, as against creditors, for fraud in fact, or is declared void, as against creditors, by the statute, by reason of not having been executed as required by the statute, can make no difference. In either case the execution, delivery, and acceptance of such an assignment, and possession under it, was a breach of the condition insisted on, and, if not properly consented to, effected a change in the interest, title, and possession of the property assigned, and avoided the policies in question. *Birdsey v. City F. Ins. Co.* 26 Conn. 165; *Treadway v. Hamilton Mut. Ins. Co.* 29 Conn. 68; *Dadmun Mfg. Co. v. Worcester Mut. F. Ins. Co.* 11 Met. 429, 434; *Baldwin v. Phœnix Ins. Co.* 60 N. H. 166; *Brown v. Cotton & W. M. M. Ins. Co.* 156 Mass. 587; *Langdon v. Minn. F. M. F. Ins. Asso.* 22 Minn. 193; *Orrell v. Hampden F. Ins. Co.* 13 Gray, 433. It may well be conceded that an alienation which is absolutely void would not operate to avoid the policies. Such were several of the cases cited and relied on by the plaintiffs' counsel.

The assignment, under the circumstances stated, was not revocable by the action or consent of the assignor and assignee. In Burrill, Assignments, § 330, it is laid down that "where the assent of creditors, or their union as parties to the assignment, is not necessary to its validity, the prevailing doctrine is that an assignment in trust for creditors, executed and delivered by the assignor and accepted by the assignee, creates at once the relation of trustee and *cestui que trust* between the assignee and the creditors, and cannot be revoked by the assignor, or the joint act of the assignor and assignee." 27 Am. & Eng. Ency. of Law, 319, 320, and cases cited in note; *Appeal of Howland* (N. H.), 35 Atl. Rep. 943. In *Mackellar v. Pillsbury*, 48 Minn. 396, under a statute similar to our own, it was held that an assignment for the benefit of creditors, when executed by the assignor and accepted by the assignee, creates a valid trust, which cannot be changed or revoked by the assignor, or by

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the joint act of both assignor and assignee, or by the court on their application. Nothing whatever occurred looking to a revocation or repudiation of the assignment until July 21, 1894, when the receiver was appointed in the sequestration proceeding, and after several creditors had filed their claims with the assignee. And, had it then been revoked, it is not easy to see what would have been gained to the insured or to the plaintiffs, as the policies had already been avoided by the assignment, and the loss had occurred whereby the property insured had been entirely destroyed; so that there was no property remaining, covered by the policies, when the receiver was appointed, to be delivered over to him, and there was no cause of action for its loss or destruction which he could enforce. Our conclusion is that the judgment appealed from is correct, and should be affirmed.

By the Court.—The judgment of the superior court is affirmed.

O'Connor, Respondent, vs. Decker, Appellant.

January 14 — February 2, 1897.

Guardian's liability for funds lost: Judgment of county court conclusive.

1. The direction of the county court upon the settlement of the accounts of a guardian has the force and effect of a judgment, and is conclusive of the rights of the parties. It bars any defense by the guardian to a subsequent action for the amount ordered by the court to be paid to the ward upon such settlement.
2. A guardian who deposits the trust funds in a bank must, if he wishes to protect himself from loss by a failure of the bank, make such deposit as of trust funds of the specific trust to which they belong. It is not sufficient that he take for them a certificate of deposit in his name with the abbreviation "Guar." following it, that not being equivalent to the word guardian, nor does it show for what ward the deposit is made by him as guardian.

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O'Connor vs. Decker.

APPEAL from a judgment of the circuit court for Green Lake county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

Action for a balance due from a guardian on settlement of his account.

The plaintiff became insane. She had a little property, and the defendant was made her guardian. He deposited some of her money, temporarily, in a bank, and took a certificate in the following words:

"Berlin, Wis., Apr. 19, 1890.

Thos. E. Decker, Guar., has deposited in this bank three hundred dollars, payable to the order of himself in current funds on the return of this certificate properly indorsed.

"C. A. MATHER AND Co."

The bank failed. The plaintiff recovered her sanity. There was a settlement with the guardian, and he was discharged. There was found due from him on such settlement, to the plaintiff, the sum of $572.74. The county court directed him "to pay over to her [the plaintiff] all property in his hands belonging to her, which amount appears by his final settlement to be $572.74." He paid over all but the amount of the certificate of deposit, which he tendered, and she refused to take. This action was brought to recover the balance of the sum found due. The defense was the deposit and consequent loss of the money. There was no controversy about the facts. The court directed a verdict for the plaintiff for $300 and interest. From a judgment on that verdict, the defendant appeals.

For the appellant the case was submitted on a brief by *Perry Niskern.* To the point that, if the trustee pays trust moneys to a banker as belonging to the trust estate, and the banker fails, the trustee is not liable, he cited *School District v. First Nat. Bank*, 102 Mass. 174; *Litchfield v. White*, 7 N. Y. 438, and cases cited by the court.

For the respondent there was a brief by *Felker, Stewart & Felker*, and oral argument by *F. C. Stewart.*

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NEWMAN, J. No doubt, the direction of the county court upon the settlement of the accounts of the guardianship has the force and effect of a judgment, and is conclusive of the rights of the parties, for the judgment of a county court as to matters within its jurisdiction is as conclusive and final as the judgment of any other court. *Barker v. Barker*, 14 Wis. 131, 147; *Brook v. Chappell*, 34 Wis. 405; *Appeal of Schæffner*, 41 Wis. 260. So, the defense was already concluded by that judgment, and not open to the defendant in the action.

But it would seem that the judgment is right upon the merits. It is well settled that a trustee who deposits the trust funds in a bank, if he would protect himself from loss by a failure of the bank, must make the deposit as of trust funds, and not as his own. He must be diligent to distinguish them as trust funds. It is said: "The deposit must wear the impress of the trust, or he cannot, when brought to account, call it 'trust property.'" It must be expressed in terms unequivocal, and not to be misunderstood, "that they are the funds of the specific trust to which they belong." The credit must be to him *as trustee*. "If he neglects any of these precautions, he will be responsible for any loss." *Williams v. Williams*, 55 Wis. 300. It is not enough to inform the bank that the money is trust funds, even though he acts in entire good faith. *Booth v. Wilkinson*, 78 Wis. 652. So great strictness has been found necessary for the protection of trust estates. The trouble with the defendant's certificate of deposit is that it does not bear upon its face the impress of the equitable ownership of the fund. It does not show whose money was deposited. It should, at least, have shown that the money was deposited by the defendant *as* guardian of the plaintiff. The letters "*Guar*," which follow the defendant's name in the certificate, are no recognized abbreviation, and cannot be the legal equivalent of the word *guardian*. And, even with that aid, it would come short of

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showing that the deposit was made in his office *as guardian of the plaintiff*.

By the Court.— The judgment of the circuit court is affirmed.

THE STATE EX REL. GETCHEL, Respondent, vs. BRADISH and another, Appellants.

January 14— February 2, 1897.

Excise: Revocation of license: Disqualification of supervisor.

Where the chairman of a town board of supervisors hired a minor to buy whisky from a licensed vender, for the purpose of obtaining evidence of his selling liquor to minors, *held*, that such chairman was disqualified from sitting as a member of the board in investigating the matter and revoking the license of such vender, and the action of the board in that matter, he acting as a member, was null and void. MARSHALL and NEWMAN, JJ., dissenting, *hold* that a permit to sell intoxicating liquor is not a vested property right, nor entitled to constitutional protection as such; and that a supervisor who, in the discharge of his duty as such, files a complaint, is not disqualified from acting on the board in investigating and deciding upon the charges.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

The case is fully stated in the opinion.

Herbert L. Sweet, attorney, and *C. D. Cleveland*, of counsel, for the appellants, argued that the town board acted not in a judicial but in a purely ministerial capacity in the matter of revoking a license, and the prejudice of one member could not invalidate their action. The revocation of a license is not a taking of a property right. *State ex rel. Starkweather v. Common Council of Superior*, 90 Wis. 612.

For the respondent there was a brief by *Hume, Oellerich & Jackson*, and oral argument by *John W. Hume*.

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CASSODAY, C. J. It appears from the record that July 17, 1895, the town board of *Rushford* granted and issued to the relator a license to sell at retail at the village of Eureka, in said town, intoxicating liquors, to be drunk upon the premises; that upon complaint made and trial had before the town board under sec. 1558 *et seq.*, R. S., the relator was convicted of selling whisky to a minor without the written order of the parent or guardian of said minor, and his license was revoked; that thereupon a writ of *certiorari* was obtained from the circuit court to review such proceeding of the town board; that upon the return thereto, and hearing had, it was adjudged by the circuit court that the proceedings of the town board in the matter of revocation of the liquor license of the relator be in all things annulled, set aside, and held for naught, with costs; that thereupon the trial judge certified to this court that the case necessarily involved the decision of a question or point of law of such doubt and difficulty as to require a decision of the same by this court, and also a construction of the state and federal constitutions as to due process of law; that one W. W. Noble, the chairman of the board, had procured and hired the minor to purchase the whisky for the purpose of procuring evidence against the relator of selling liquor to minors; and that he then sat upon said trial, and participated in the same and in said judgment or determination,—and so submits to this court the following question: Was the chairman disqualified to sit as a member of the board in hearing the case, so as to render the action of the board null and void?

The question submitted for our consideration is not whether the relator was guilty or innocent of violating the statutes cited, but whether the chairman of the town board, after having "procured and hired the minor to purchase the whisky," was a proper person to sit in judgment and determine whether the relator's license should or should not be revoked for selling the whisky. Of course, it is important

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that the laws should be enforced, and that every violation thereof should be punished. But it is still more important that, as far as possible, every person accused of an offense should have a fair trial before an impartial tribunal. It is claimed, in effect, that, as there is no provision for changing the venue in such proceeding, the town board must, of necessity, act, regardless of any interest or prejudice on the part of those composing the board. Assuming that this may be true in practice to a certain extent, yet it does not justify members of such board in voluntarily corrupting or prejudicing themselves by advancing money and procuring and abetting the commission of the offense in order that they may pronounce judgment upon the offender who committed the same. The statute disqualifies jurors having an interest, or related to either party, or having expressed or formed an opinion, or being sensible of any bias or prejudice. S. & B. Ann. Stats. sec. 2849. So it disqualifies any judicial officer who is interested in the cause, or who has acted as an attorney for either party thereto, from reviewing in an appellate court what he determined in the trial court, or giving counsel or advice in any matter that may come before him. S. & B. Ann. Stats. secs. 2579, 2580, 2582. Such statutes are confirmatory of the common law. This court has held that the revocation of such license by the board granting it is void, unless made after notice to the licensee and an opportunity given to him to be heard upon the charge made. *Common Council of Oshkosh v. State ex rel. Perkins*, 59 Wis. 425. This is because the license is a vested property right. In *Collins v. Blantern*, 2 Wils. 350, that very able jurist, Lord Chief Justice WILMOT, of the common pleas, quotes approvingly this: "You shall not stipulate or promise to pay money to a man *not to do a crime*." He further states: "You shall not stipulate for iniquity. All writers upon our law agree in this,—no polluted hand shall touch the pure fountains of justice." *Id.* In the case at bar the chairman

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of the tribunal to do justice furnished the money, and procured the active agency, in the commission of the offense.

The case of *The Queen v. London County Council* [1892], 1 Q. B. 190, seems to be very much in point. "The London county council delegated to a committee of their body the hearing of applications for music and dancing licenses. The committee, by a majority, recommended that a license which had been applied for should not be granted. The applicant thereupon applied to the county council for a license. At the hearing before the county council, certain members of that body, who were also members of the committee and had voted in the majority against granting a license at the hearing before the committee, instructed counsel to represent them before the county council and oppose the application for a license. The councilors so instructing counsel were present at the hearing, but did not vote. The council, by a majority, refused the application for a license. *Held*, that the presence at the meeting of those members of the county council who had instructed counsel to oppose the application vitiated the proceedings." In the same case it was further held that "the county council, in determining applications for music and dancing licenses, are acting judicially, and are bound by the same principles as are binding on justices in determining questions which come before them for judicial decision." The opinion of the court, quoting approvingly from another case, says: "Of course, the rule is very plain that no man can be plaintiff or prosecutor in any action, and at the same time sit in judgment to decide in that particular case, either in his own case, or in any case where he brings forward the accusation or complaint on which the order is made." *Id.* 195, 196; *Leeson v. General Council*, 43 Ch. Div. 379. This is substantially done in the case at bar. See, also, *Queen v. Huggins* [1895], 1 Q. B. 563, and cases cited in the brief of the relator's counsel. The mere fact that only one of the three members of the board thus dis-

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qualified himself to sit in judgment did not relieve the board, as a whole, from being incompetent. *Id.; Queen v. Justices of Herfordshire*, 6 Q. B. 753; *S. C.* 51 Eng. C. L. 753; *Queen v. Meyer*, 1 Q. B. Div. 173; *Queen v. Justices of Suffolk*, 18 Q. B. 416; *S. C.* 83 Eng. C. L. 416.

The case of *State ex rel. Starkweather v. Common Council of Superior*, 90 Wis. 612, is clearly distinguishable. That was a proceeding by the council, under express statutory authority, to remove the mayor, as a member of that body, and yet it was held that he could not sit as a member of the council upon the trial of charges against himself.

The question propounded is answered in the affirmative.

By the Court.— The judgment of the circuit court is affirmed.

MARSHALL, J. With all that is said in the opinion of the court respecting the importance of maintaining a high standard of judicial purity and of impartiality respecting all persons and bodies of persons charged with the performance of judicial or *quasi* judicial duties, I fully concur, but nevertheless dissent from the conclusion reached in this case, believing that it is inconsistent with well and long settled principles of law. The decision appears to proceed upon the theory that a license to sell intoxicating liquor is a vested right of property, and that its possessor is entitled to constitutional protection in such possession, as in case of a contract right. In support of that view, *Common Council of Oshkosh v. State ex rel. Perkins*, 59 Wis. 425, is cited. What there is in that case to sustain such view is not perceived. The law provides that before a license shall be revoked the licensee shall be notified of the charges preferred against him, and have an opportunity to be heard. The *Oshkosh Case* turned on the failure to obey the statute in that regard. No mention is made of the character of the right at all. The leading case on the subject in this country

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is *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657, where Mr. Justice WRIGHT said: "Licenses to sell liquors are not contracts between the state and the persons licensed, giving the latter vested rights protected by the constitution; nor are they property in any legal or constitutional sense. They have neither the qualities of a contract nor of property, but are merely temporary permits to do what otherwise would be an offense against general law." And further, in effect, the law regulating the subject pertains to the police system of the state, over which the legislature, under the constitution, has general authority; and, pursuant thereto, it may make such laws as it may deem proper, respecting the granting and revocation of licenses. In *Sprayberry v. Atlanta*, 87 Ga. 120, the license was held revoked without notice, consequent on a conviction for violation of the conditions subject to which it was granted. In answer to the contention that a forfeiture of the license without proceedings therefor in a competent tribunal was a violation of the constitutional right of property, Mr. Justice SIMMONS said: "A license to sell liquor is not a contract, but only a permission to enjoy the privilege, on the terms named, for a specified time, unless sooner abrogated. The granting of a license is the exercise of the police powers, and does not include any contractual relation whatever. It is not property, in any sense in which property rights are protected under the constitution." A multitude of authorities could be cited to the same effect, but I content myself with mentioning the following: *Beer Co. v. Massachusetts*, 97 U. S. 25; *La Croix v. Fairfield Co.* 49 Conn. 591; *Comm. v. Brennan*, 103 Mass. 70; *Powell v. State*, 69 Ala. 10; *Fell v. State*, 42 Md. 71; *Constitutional Prohibitory Amendment*, 24 Kan. 700, 724; *Brown v. State*, 82 Ga. 224; *Martin v. State*, 23 Neb. 371; *Hurber v. Baugh*, 43 Iowa, 514; *Comm. v. Kinsley*, 133 Mass. 579. In *Hurber v. Baugh*, *supra*, Mr. Justice ROTHROCK, speaking for the court, said that *State ex*

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rel. Heise v. Town Council of Columbia, 6 Rich. Law, 404, was the only case they could find holding to the contrary view; and, after a reasonably thorough search at this time, I am only able to add *State ex rel. Shaw v. Baker*, 32 Mo. App. 98.

In view of the foregoing, I feel warranted in vigorously protesting against committing this court to the decision that a permit to sell intoxicating liquor is a vested right of property, and entitled to constitutional protection as such, and to insist that it is a mere permit, the granting, refusing, and revoking of which are subject to regulation by legislative authority without constitutional restriction. So long as the proceeding for such granting, refusing, or revocation conforms to legislative requirements, it cannot properly be questioned in any tribunal as a violation of constitutional rights.

It is said in the opinion of the court that the question here presented is distinguishable from that in *State ex rel. Starkweather v. Common Council of Superior*, 90 Wis. 612, but wherein is not stated. To be sure, the court say that was a proceeding under express statutory authority, but so is a proceeding to revoke a license, and the modes of procedure in both are almost precisely the same. The court further say that it was there held that the mayor could not sit as a member of the council while he was on trial. Why prominence should be given to that fact, when no such question is presented in this case, and the fact be overlooked that the court also distinctly held that the person who signed the complaint against the mayor, and appeared in the role of prosecutor as well, properly participated in all the proceedings as one of the triers, when that is the very question here involved, is not perceived. If my brethren say that the two cases are distinguishable, in that this case involves a vested right of property, and that the *Starkweather Case* did not, but a mere privilege, that is un-

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founded, as we have clearly shown. Of the right involved in the former case, Mr. Justice WINSLOW, in substance, said: It was not a vested right of property. The legislature, which created the office, had the undoubted right to make provision for removing an incumbent therefrom, there being no constitutional restrictions in the way. So long as the body clothed with the power to make such removal complied with the required procedure in that regard, such proceedings were not open to question; hence the fact that one of the members of the council who signed the charges appeared in the double capacity of prosecutor and trier did not affect the validity of the result. That conclusion certainly was warranted, in view of the fact that the vote of the interested person did not determine such result. It will be seen that the right involved, properly understood, was not a right of property, in either case, but was a privilege, in the one case, conferred by legislative authority, under constitutional power, to create and provide for the government of municipal corporations; and in the other it was a mere permit to engage in a traffic, granted pursuant to legislative regulations in the exercise of its general police powers, over which there are no constitutional restrictions. While it was said in the *Starkweather Case* that the duties of the removing body were ministerial in character, in the same sense proceedings to revoke a license are ministerial. The procedure prescribed by statute is of a judicial nature, and the power exercised, strictly speaking, is of a *quasi* judicial character in both cases. So there is absolutely no distinction between the two cases, respecting the character of the right involved or the nature of the proceedings. In my opinion the *Starkweather Case* was rightly decided, and rules this case in favor of a negative answer to the question certified to this court.

I am not unmindful of the fact that the foregoing is not in accordance with the English rule, which this court has seen fit to adopt. I am unable to find authority elsewhere

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to support such rule, and may safely venture to say that none exists, for the reason that none is referred to by my brethren. The furthest our courts have gone on the subject is to hold that, if the presence of the interested member of the tribunal is necessary to make a quorum, or his vote to determine the result, the proceedings are void. In *Stockwell v. White Lake*, 22 Mich. 341, where the proceedings were to remove a school-district officer, the rule was stated thus: "Such a proceeding is in the nature of a judicial investigation, and, when one member of the board is interested in the subject of the complaint, his presence thereon, if necessary to a quorum, renders the proceedings void." See, also, to the same effect, Throop, Pub. Off. § 379; *Foster v. Frost*, 25 Neb. 731; and *State ex rel. Cornell v. Kaso*, 25 Neb. 607.

But there is a further very cogent reason why Supervisor Noble, though he signed the complaint, properly participated in the subsequent proceedings. By sec. 1553, S. & B. Ann. Stats., it is made one of the duties of supervisors to enforce the laws respecting the sale of intoxicating liquor; and to that end they are required to make complaints and institute criminal prosecutions in all cases where they know, or are credibly informed, of any violation of the liquor laws. We cannot subscribe to the doctrine that if a supervisor performs a duty commanded by statute, under a severe penalty for failure so to do, he thereby "corrupts himself," and becomes disqualified from performing another duty also strictly enjoined upon him by legislative enactment. Performance of both duties must have been in contemplation by the legislature, for no provision was made for filling a supervisor's place on the board, on a hearing to revoke a license, when such supervisor shall have instituted proceedings against the licensee for violation of the excise law. Whether it is good policy to impose upon supervisors the double duty mentioned is something with which we have nothing to do. Being mere police regulations, as before stated, within the scope of the

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general police powers of the state, they cannot be questioned by the court on constitutional grounds. The supervisors may perform both duties, and the performance of one constitutes no disqualification for the performance of the other. Such was the determination in *People ex rel. Skahan v. Board of Police Comm'rs of New York*, 10 Hun, 106, affirmed in 76 N. Y. 613. Such rule seems to follow necessarily from the state of the law and the nature of the duties under consideration.

Further discussion is unnecessary to state clearly the reasons for my dissent from the opinion of the court. To recapitulate briefly, I hold that the following principles of law govern this case:

1. A license to sell intoxicating liquor is not a right of property, or a contract right, or property in any sense, to be protected under the constitution, but is a mere permit, granted in the exercise of the general police powers of the state, to carry on an occupation under such regulations, and subject to revocation in such manner, as the power granting the same may see fit, by legislative enactment, to provide.

2. A supervisor who files a complaint against a licensee to sell intoxicating liquors, for a violation of the conditions under which such license is held, is in no event, from that fact alone, disqualified from investigating the truth of such complaint and deciding thereon, as a member of the board charged with that duty, unless his presence be necessary to a quorum or his vote determines the result.

3. Where a statute, as in this case, requires a supervisor to institute proceedings against an offending licensee for the violation of the conditions of his license upon receiving knowledge of such violation, and also imposes upon such supervisor the duty of investigating charges and deciding thereon, in proceedings to revoke such license for such violation, his compliance with the law in one capacity will not operate to disqualify him from acting in the other.

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In the foregoing we have not seen fit to notice the fact that Supervisor Noble furnished the opportunity for the licensee to violate the law. Whether his conduct in that regard constitutes such overzealous activity in the detection and prosecution of persons reputed to be violating the liquor laws as to legitimately subject him to criticism, has really nothing to do with the principles here discussed, and upon which the answer to the question certified turns.

NEWMAN, J. I concur in the above opinion of MARSHALL, J.

COOK and another, Appellants, vs. **THE CITY OF MENASHA**, Respondent.

January 15 — February 2, 1897.

Appeal from order.

An order of the circuit court, denying a motion to vacate an order for the bringing in of additional parties, is not appealable under ch. 212, Laws of 1895.

APPEAL from an order of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Appeal dismissed.*

The case is stated in the opinion.

For the appellants there were briefs by *Webster & Classon*, and oral argument by *W. H. Webster*. To the point that the order was appealable as a final order affecting a substantial right in a special proceeding, they cited *Hekla F. Ins. Co. v. Morrison*, 56 Wis. 133; *Carney v. Gleissner*, 62 id. 493; *Morse v. Stockman*, 65 id. 36.

Gabe Bouck, for the respondent.

MARSHALL, J. On the 18th day of December, 1895, the defendant, by its attorney, on the hearing of a motion duly made for that purpose, obtained an order bringing in other

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parties as defendants. On the 16th day of January, 1896, a motion on the part of plaintiffs was duly brought on for a hearing before the court, for an order vacating the order of December, 18, 1895. Such motion to vacate was denied, and an order accordingly entered from which the plaintiffs appealed. This case is ruled by *Smith v. Scott*, 93 Wis. 453, where this court held that such orders are not appealable, under ch. 212, Laws of 1895. Therefore this appeal must be dismissed for want of jurisdiction to entertain it.

By the Court.— The appeal is dismissed.

THE STATE EX REL. HINZ, Respondent, vs. McKONE, Appellant.

January 15 — February 2, 1897.

Oshkosh, charter construed: Appeals, limitation by amount involved.

1. Section 9 of subchapter IV of the charter of the city of Oshkosh (ch. 59, Laws of 1891) provides for the election by the city council of one constable, and his term of office is fixed at two years. Section 19 provides that any alderman when elected by the common council may become a constable,— and that when he ceases to be an alderman he shall cease to be a constable. Section 1, subchapter XXIII, prohibits an alderman from holding any other municipal office except as otherwise provided. *Held*, in an action to try the title to the office of constable, that by a proper construction of these sections of the charter only one constable is provided for, and that an alderman who has been made a constable can hold his office only for two years, and his term as such is not extended by the provision that if, before the end of his term, he ceases to be an alderman his office as constable shall cease.
2. An appeal in a *quo warranto* case to try the title to an office is not within the provisions of ch. 215, Laws of 1895, limiting the right of appeal to the supreme court in cases involving less than $100, by requiring a judge's certificate. That chapter applies only to cases involving money, or some right the value of which can be computed in money.

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The State ex rel. Hinz vs. McKone.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

This is an action, in the nature of *quo warranto*, to try the title to the office of constable in the city of Oshkosh. The facts were not in dispute. The defendant's answer to the relation was stricken out as frivolous, and, no amended answer being served, judgment for the plaintiff was rendered, and the defendant appealed. The facts are succinctly stated by the circuit judge in an opinion filed by him upon the motion: "It appears from the complaint that defendant, *McKone*, was elected constable in April, 1893, 'for the term of two years,' and duly qualified. Of course, the term is fixed by the charter, and, if the complainant put an erroneous construction upon the charter, it would not affect defendant's rights. In May, 1895, the relator, *Hinz*, was elected by the council as a constable, and duly qualified. Both were aldermen when elected, and still are such. For some reason, which does not appear on the face of the pleadings, *McKone* on the 17th day of March, 1896, gave a new bond, which was duly approved by the common council, and also took another oath of office. The relator claims that the defendant's term of office expired when the relator was elected, while the defendant claims that he is still constable, by virtue of being still an alderman, the latter's term of office being four years. All the foregoing facts are admitted or alleged by the answer, and the question which party is the lawful constable — whether there can be more than one constable, under the charter — must be determined by the provisions of the charter itself."

For the appellant there was a brief by *Bouck & Hilton*, and oral argument by *Gabe Bouck*. They contended that the constable elected under sec. 9 was a city officer,— a sort of high constable, who might have different duties imposed upon him, and under sec. 13, subch. IV, might be paid a salary, while the alderman made constable was invested only

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with the ordinary powers of that office. Sec. 19 has no reference to the high constable elected under sec. 9, the offices being different.

For the respondent there was a brief by *Hume, Oellerich & Jackson*, and oral argument by *J. W. Hume.*

WINSLOW, J. The question at issue simply involves a construction of certain provisions of the charter of the city of Oshkosh, which will be found published as ch. 59, Laws of 1891. The provisions in question are as follows:

Subch. IV, sec. 9: "At the first meeting of the common council, or as soon thereafter as may be, there shall be the following city officers appointed by the mayor and confirmed by a majority of all the members of the common council voting in favor of such confirmation, a comptroller, a city attorney, a chief of police and a chief of the fire department, who shall hold their offices for the term of two years. There shall be the following city officers elected by the common council at its first meeting or as soon thereafter as may be, a president of the council, a city physician, a city surveyor, a health officer, an overseer of the poor, *a constable*, one or more policemen, one or more firemen and such other officers as the common council may deem necessary, who shall hold their offices for the term of two years."

Sec. 19: "The chief of police, any of the regular police of said city, regularly employed and paid by the city, and any alderman of said city, when elected by the common council, may become *a constable* in and for said city by taking the oath and giving the bond required by law for the qualification of constables, the bonds to be approved by the council, said bond and oath to be filed with the city clerk. When such person shall cease to be a policeman or alderman, he shall cease to be a constable."

Subch. XXIII, sec. 1: "No alderman shall hold any other municipal office, except as otherwise herein provided."

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Subch. IV, sec. 10: "The term of office of all city officers shall commence upon their election or appointment and qualification, and shall hold for two and four years respectively, as herein provided and until their respective successors are elected or appointed and qualified."

The circuit judge, after remarking that under sec. 9, *supra*, standing alone, there can be no question but that "one constable" holding his office for two years is provided for, proceeds as follows: "Is there anything in sec. 19 which conflicts with this, or modifies it? The only purpose of that section, fairly construed, and the intent of legislature, would seem to be to permit policemen and aldermen, when elected by the common council, to hold the additional office of constable. By sec. 1 of subch. XXIII, an alderman is prohibited from holding any other municipal office, except as otherwise provided; and sec. 19 furnishes the 'otherwise provided,' or exception to the general rule, by saying that an alderman may also be a constable, when elected by the common council. It also provides that his term of office shall cease when he ceases to be an alderman. Does this make the term of the constable who chances also to be an alderman extended for four years, when the term of any other man is only two years? It seems to me that it will hardly bear such construction. The natural interpretation appears to be that an alderman or policeman who has been elected constable under sec. 9 shall hold his office for the term there provided,— two years,— unless before the end of the term he ceases to be an alderman. If he does so cease, then the office of constable becomes vacant *ipso facto*. And only one constable is provided for by the charter. Such seems to have been the intent of the legislature in these various sections. If these views are correct, it follows that defendant *McKone's* term as constable was for only two years; that the relator, *Hinz*, at the end of that time, was lawfully elected as his successor, and the defendant's term

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of office and powers as constable were at an end." This construction of the statute seems to us entirely reasonable, and it seems to substantially reconcile the apparently conflicting provisions without doing violence to them.

A motion to dismiss the appeal was made on the ground that the case did not involve $100, and that no sufficient certificate has been made by the circuit judge to bring the case within ch. 215, Laws of 1895, and the recent decisions of this court in the cases of *Independence Creamery Co. v. Lockway*, 94 Wis. 148, and *Leppla v. Reed*, 94 Wis. 307. The certificate certainly is deficient, but we do not regard the case as within the provisions of ch. 215, aforesaid. This court, under secs. 3047, 3048, R. S., possesses jurisdiction to hear and decide appeals from any judgment of the circuit court, unless such jurisdiction is taken away by the terms of ch. 215. This chapter takes away jurisdiction (in the absence of the proper certificate) in a certain class of cases, to wit, cases where the amount involved, exclusive of costs, is less than $100. We regard this as meaning that in cases involving money, or some right the value of which can be calculated in money, the amount of money or the value of the right in controversy must equal or exceed $100; but we do not regard it as including cases involving mere abstract rights, not measurable in money or property, such as the right to an office. Many offices, both of dignity and importance, have no salary or fees attached to them, yet a contest over such an office may be of vast importance, both to the parties and to the public, in comparison with which a mere $100 claim would be a trifle. The value of such a right cannot be reduced to any pecuniary standard of value. The reasoning is similar to that used in the case of *Barry v. Mercein*, 5 How. 103, where the question was whether a *habeas corpus* proceeding came within a law authorizing appeals only in cases where the matter in dispute exceeded $2,000, and it was held that it did not, because the right in

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dispute could not be calculated in money. In the present case there are, it is true, some fees connected with the office of constable, but this does not alter the fact that the substantial matter in dispute is the title to an office of some honor and importance, and not dollars and cents.

By the Court.— Judgment affirmed.

ALEXIAN BROTHERS, Respondent, vs. CITY OF OSHKOSH, Appellant.

January 15 — February 2, 1897.

Municipal corporations: Damages for opening streets.

In a proceeding by a municipal corporation to condemn land for a street through a tract which is used for agricultural purposes only, no speculative damages or values should be allowed, nor should the value of the land taken be determined by what it might be worth at some remote future time, when it might be used for some other purpose, but it should be governed by the fair market value thereof at the time it was taken, for any purpose for which it might reasonably be used in the immediate future; and if its adaptability to some use to which it might be put in the near future, such as platting into city lots, increased its value at that time, such increase would be a proper ground of assessment of damages.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

This was an appeal from an assessment of damages and benefits in the matter of the condemnation of certain land belonging to *Alexian Brothers*, a corporation, for the opening of Wisconsin avenue, in the city of *Oshkosh*, through block 133, said block being owned and occupied by the plaintiff, fronting on two streets, namely, New York avenue and Prospect avenue, the strip taken being sixty feet wide and 604 feet in length, running due north and south through

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the center of the block. The award of the board of public works was $250 for the strip of land and $150 for benefits. The *Alexian Brothers* appealed to the circuit court. Upon the trial in the circuit court it was agreed that the benefits would amount to $150, and the controversy was as to the value of the strip of land taken, amounting to five sixths of an acre. The only question presented is as to the rulings of the court in its charge to the jury.

It appeared that the land had never been platted into lots, and there were no streets running through it in either direction. The block was about 604 feet in depth, north and south, and about the same width from east to west. The south one half was used for pasture, and the north one half for raising of oats and other grain, and in part for a vegetable garden. The witnesses on the part of the plaintiff, as to the fair market value of the land, testified variously that it was worth from $1,400 to $1,500, $1,700, and $2,000. They were real-estate dealers, and familiar with such property. The testimony on the part of the defendant was that the land was worth from $700 to $750 and $800. The witnesses for the plaintiff based their opinion somewhat upon the fact that by platting the land into lots it would sell in the market for more than if sold by the acre, and would sell for from $1,400 to $2,000, and they gave various estimates of the value if the strip was divided into two large lots, one fronting on New York avenue, and the other on Prospect avenue.

The court instructed the jury that in determining the value of the land actually taken they were to be governed by the fair market value at the time it was taken, for any purpose for which it might reasonably be used in the immediate future; that the question was, What was the land then worth in the market, with reference to its availability by a prudent and discreet business man? that if the present value was enhanced by reason of its adaptability to some

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use to which it might be put in the near future, was so situated that it might be platted into city lots, and that its present value was thereby increased, such increase was a proper basis for the assessment of damages. At the request of the defendant, the court instructed the jury that, in determining what the fair market value was, they "must consider its value to the owner in the market, and its value is not to be determined by what the land might be worth at some remote future time, when it might be used for some other purpose; but you may consider its present value for such purpose, and its adaptability for some other use in the near future. The actual use to which it is put must also be considered with the surrounding circumstances. You are not to include remote or speculative values, but only the value of the land when it was taken with reference to its availability for any purpose to which it might reasonably be put. In determining the fair market value of the property taken, you have the right to take into consideration its location, the fact that it has been used by the owner for agricultural purposes, and that it has been assessed as acreage property. The fact that this property is located within the corporate limits of the city of *Oshkosh* does not affect its value as lots. The owner has a right to use it for agricultural purposes; and, that being what the owner used it for, in determining its value to the owner you should not take into consideration what it might be worth at some remote and future time, when it might be put on the market as lots; but you may consider its present value for such purposes." And the court further charged that "Speculative damages cannot be allowed. You can only allow actual damages; that is, what the owner has been damaged, considering the value of the land to the owner, and his use of it."

The court refused to instruct the jury that they "should not consider what the land would sell for in the distant

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future, if the premises had been platted into lots, streets opened, and the lots offered for sale." Also "that the price per lot is not a measure of value, either in the near or distant future, for that is too remote, uncertain, and speculative."

The jury, in answering the questions, found the fair market value of the strip of land taken by the city of *Oshkosh* for street purposes, at the time of the taking, to be $1,200, and assessed the benefits to the remainder of the land on account of taking said land and laying a street through it at $150. A motion was made to set aside the finding as contrary to law and the evidence, for excessive damages, for misdirection on the trial by the circuit judge, and for refusing instructions asked. The motion was overruled, and the plaintiff had judgment for $1,200, less said benefits, together with costs,— in all $1,121.41,— from which the defendant appealed.

J. H. Davidson, for the appellant, as to the proper rule for estimating damages in such a case, cited *Watson v. M. & M. R. Co.* 57 Wis. 332, 356; *Munkwitz v. C., M. & St. P. R. Co.* 64 id. 403; *Welch v. M. & St. P. R. Co.* 27 id. 108; *Burt v. Wigglesworth*, 117 Mass. 302.

For the respondent there was a brief by *Hume, Oellerich & Jackson*, and oral argument by *John W. Hume.*

PINNEY, J. The instructions to the jury were sufficiently favorable to the defendant, and left the case for the determination of the jury in accordance with proper guides for determining the value of the property taken. The court told the jury that speculative damages were not to be allowed, and in determining the value of the land they should not take into consideration what it might be worth at some remote and future time, when it might be used for some other purpose; that in determining the value of the land taken they were to be governed by the fair market value at the time it was taken, for any purpose for which it might

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reasonably be used in the *immediate* future; that if the present value was enhanced "by reason of its adaptability to some use to which it might be put in the near future, was so situated that it might be platted into city lots, and that its present value was thereby increased, such increase was a proper ground of assessment of damages;" that "the actual use to which it is put must also be considered with the surrounding circumstances; that you are not to include remote or speculative values, but only the value of the land when taken, with reference to its availability for any purpose to which it might reasonably be put;" that they "should not take into consideration what it might be worth at some remote and future time, when it might be put on the market as lots, but you may consider its present value for such purposes."

The only evidence as to the value of the land taken, tending to show what it would be worth in the "immediate" or "near" future, was that it would be worth more if platted into lots, which could have been readily and immediately accomplished,— at least without material delay,— than if kept as acreage property. The language "immediate or near future" had reference to this aspect of the case, and cannot, we think, under the circumstances, be regarded as erroneous or misleading. It referred to present advantage or adaptability of the property, which might be realized with but trifling expense, and without material delay. The instructions were in substantial conformity to the law as held in *Washburn v. M. & L. W. R. Co.* 59 Wis. 378; *Driver v. W. U. R. Co.* 32 Wis. 569, and *Esch v. C., M. & St. P. R. Co.* 72 Wis. 232. The instructions given embraced, in substance, all that was contained in the instructions refused that was applicable to the case, and the refusal to give them as asked was not error. The evidence fully sustains the finding of the jury, and the motion for a new trial was properly denied.

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It follows from these views that the judgment of the circuit court must be affirmed.

By the Court.— The judgment of the circuit court is affirmed.

JOHN R. DAVIS LUMBER COMPANY, Respondent, vs. HARTFORD FIRE INSURANCE COMPANY and others, Appellants. SAME, Appellant, vs. SAME, Respondents.

January 16 — February 2, 1897.

Insurance: Contract by broker: Ratification: Cancellation: Notice to agent: Rescission of contract.

1. Although sec. 1977, R. S., declares that whoever solicits or procures insurance from an insurance company on behalf of another, or makes any contract for insurance, or collects any premium, etc., shall be held to be an agent of such insurance company "to all intents and purposes," it cannot be construed to prevent an insurance broker employed to procure insurance for another from being the agent of the assured at the same time in procuring the policy; and the same rule applies as in other agencies, that the principal is bound by the acts and representations of the agent within the scope of his authority. Where the two relations conflict, the statute must prevail.
2. An agreement made by an insurance broker, when procuring insurance from certain agents of insurance companies, that his principal should not take or accept additional insurance in the same companies from other agents thereof, is binding upon the principal, he knowing it to be the policy of insurance companies to limit the amount of insurance to be carried by them respectively on such property, even though he had no notice of such agreement until after the first loss; and if the assured then, with full knowledge of all the facts, insists upon taking the benefits of the policies procured in violation of that agreement, he thereby ratifies the same, whether originally authorized or not.
3. Where additional policies were procured by the assured in violation of the agreement of such broker, and the insurance companies, after the first loss, insisted upon recalling, revoking, and unmaking the first contracts of insurance, and treating them as if they

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had never been in force, and claiming that they were wholly inoperative from the beginning, as by tendering back the whole amount of the premiums, demanding a return of the policies, and keeping the tender good, they cannot be held to have waived such agreement.

4. A notice of cancellation served on the broker who, as agent for the assured, procured the policies, after his agency had ceased, is ineffectual.

5. The right to cancel a policy exists only by contract, and the provisions of the policy conferring such right must be strictly complied with in order to effect a cancellation. There must be an actual notice of cancellation, not a mere notice of a desire to cancel or a notice that the policy will be canceled, or a notice to cancel, and it must be served on the proper person, and a tender made of the unearned premium. A tender and demand for a surrender of the policies, made for the purpose of a rescission or cancellation from the beginning and refused on that ground, cannot operate as a sufficient tender to effect a cancellation.

APPEALS from judgments of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed on plaintiff's appeal; reversed on that of the defendants.*

Action to recover on several policies of insurance against loss by fire. The *Hartford Fire Insurance Company of Hartford, Connecticut*, the *National Fire Insurance Company of Hartford, Connecticut*, and the *Phœnix Assurance Company of London, England*, each issued one of such policies, for $5,000, through its agents, Sunderland & Ostrander, at West Superior, Wisconsin, June 10, 1894, and each of such companies made another of such policies for $5,000, through its agents, Robert Shields & Son, at Neenah, Wisconsin. The pleadings raised the disputed questions covered by the findings of fact, and such requests to find as are referred to in this statement and the opinion following. The case was tried by the court, and resulted in findings of fact, in substance as follows: (1) Plaintiff, in June, 1894, had a large lumber manufacturing plant at Phillips, Wisconsin, upon which it carried insurance on the co-operative plan, to

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the extent of about $182,000. (2) Defendants' agents at West Superior, Wisconsin, also their agents at Neenah, Wisconsin, had general authority to issue and cancel policies, receive and give notice of cancellation of the same, under the rules and regulations of the defendants, but they were not permitted to issue double lines; that is, one agent was not permitted to issue a policy on property covered by a policy issued from the other agent in the same company. (3) H. Winchester was an insurance agent at Phillips, Wisconsin, during all the time mentioned in the findings, but not the agent for the defendants. For several years he had written what insurance he could in companies represented by him, on plaintiff's property, and was permitted by it to obtain insurance on such property in other companies. Such insurance, written or procured by him, amounted to about eighty per cent. of that carried on the property. (4) All policies obtained by Winchester were subject to plaintiff's approval. (5) During the time Winchester obtained insurance on plaintiff's property as aforesaid, it also obtained some insurance through other agencies. (6) There was no agreement between plaintiff and Winchester that the latter should control all the insurance. (7) Winchester kept a running account of premiums with plaintiff, and was paid from time to time as he desired. (8) About October 9, 1894, Winchester obtained a $5,000 policy in each of the companies named, at their West Superior agency, and agreed with Sunderland & Ostrander, the agents, that there should be but one line of policies issued by defendants on plaintiff's property taken by him; but plaintiff was not informed of such agreement till after the first fire hereafter mentioned. (9) June 5, 1894, the president of the plaintiff ordered Shields & Son, agents for defendants at Neenah, to issue a $5,000 policy in each of the companies. Such agents had carried that amount of insurance upon the property in the same companies for some time, and the order given was for re-

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newals. The policies so ordered were not delivered or paid for till June 20, 1894. (10) At the time the order last mentioned was given, plaintiff's officers did not know that Winchester was about to procure insurance in the same companies, of Sunderland & Ostrander; neither did they have such knowledge till after the first fire hereafter mentioned. (11) Soon after the policies were issued, defendants, through the daily reports sent by their agents, were informed that two lines of policies had been issued, and immediately gave notice to such agents that one line must be canceled; and thereupon such agents corresponded with the company regarding such cancellation, till after June 19, 1894. (12) Plaintiff did not know of the controversy mentioned in No. 11 till after June 19, 1894, at which date a fire occurred which partially destroyed the property covered by the policies. (13) July 7, Sunderland & Ostrander telegraphed Winchester to cancel the policies issued from that agency; that no claim would be made for premium, and none would be accepted. The telegram containing such notice was read to plaintiff's secretary, B. W. Davis, at the office of the plaintiff. Winchester replied to the telegram that the policies had been charged to plaintiff; that, when canceled, it would be *pro rata* on items not affected by the fire; and that a draft for the amount due would be sent when canceled. On July 17, defendants tendered to the plaintiff the full amount of premiums on the policies, and demanded their surrender, which was refused. July 23, thereafter, plaintiff paid to Winchester the premiums on the policies, and he immediately sent the same by a draft, including premiums on other policies, to Sunderland & Ostrander. (14) July 27, the remaining portion of the property covered by the policies was destroyed; and on August 11, thereafter, Sunderland & Ostrander returned the draft sent as aforesaid, to Winchester, at Phillips, and the amount was duly tendered back to plaintiff, and refused. (15) June 23,

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1894, Shields & Son telegraphed plaintiff that the policies issued by them were canceled, subject to loss, and to return the same. On June 24, defendants tendered the full amount of the premium on such policies to the plaintiff, and demanded their surrender, which was refused. July 22, the tender and demand were repeated, and again refused, plaintiff offering on both occasions to surrender the policies subject to the loss of June 19, on payment of the unearned premium. (16) On July 7, also July 10, defendants notified plaintiff that the tender of July 2 would be kept good, and the policies treated as void. Defendants, after June 19, insisted upon recalling the policies issued at the Neenah agency, and treating the same as unauthorized and void.

As conclusions of law, the court found, in substance: (1) That Winchester was the agent of plaintiff to procure insurance subject to plaintiff's approval, and possessed no other authority. (2) That defendants waived the right to insist upon a cancellation of the policies issued at the West Superior agency, by collecting the premiums thereon July 23; and that plaintiff was entitled to a judgment on each of such policies, on account of the first fire, of $1,090.88, with interest thereon at the rate of six per cent. per annum from September 19, 1894, and $3,576.49, with interest thereon at the same rate from the 17th day of November, 1894, on account of the second fire. (3) That the policies issued at the Neenah agency were in force June 19, 1894, and plaintiff entitled to recover on each $1,090.88, with interest thereon at the rate of six per cent. per annum from the 19th day of September, 1894, on account of the first fire. (4) That the policies issued at the Neenah agency were duly canceled July 2, 1894. Several requests to find were refused. Exceptions were filed, sufficient to present the questions discussed in the opinion. Judgment was rendered in plaintiff's favor against each of the defendants, according to the findings and conclusions, from which judgments plaintiff ap-

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pealed, upon the ground that the court erred in finding that the Neenah policies were canceled before the second fire. Each of the defendants appealed, upon the ground that the court erred, among other things, in finding that the policies issued at the Neenah agency were binding on the defendants at any time, and in finding that the policies issued at the West Superior agency were binding after the first fire, by reason of the payment of premiums to Winchester, July 23.

For the plaintiff there was a brief by *Phillips & Hicks*, attorneys, *M. H. Beach* and *Moses Hooper*, of counsel, and oral argument by *M. C. Phillips*, *E. R. Hicks*, and *M. H. Beach*. They argued, *inter alia*, that the defendant, by tendering the whole premium, sought to rescind the contract of insurance from the beginning and deprive the plaintiff of all claim for the loss already suffered. *Rankin v. Amazon Ins. Co.* 89 Cal. 203. By electing to rescind the company waived its right to cancel. Bishop, Contracts, § 808; 7 Am. & Eng. Ency. of Law, 32. There was no agreement to cancel and no compliance with the terms of the policy in respect to cancellation. *Bingham v. Ins. Co. of N. A.* 74 Wis. 498, 504; *John R. Davis Lumber Co. v. Scottish Union & N. Ins. Co.* 94 id. 472; Wood, Fire Ins. § 113; May, Ins. § 67; *Home Ins. Co. v. Curtis*, 32 Mich. 402; *Franklin Ins. Co. v. Massey*, 33 Pa. St. 221; *Albany City Ins. Co. v. Keating*, 46 Ill. 395; *Griffey v. N. Y. Cent. Ins. Co.* 100 N. Y. 417; *Lattan v. Royal Ins. Co.* 45 N. J. Law, 458; *Ætna Ins. Co. v. Weissinger*, 91 Ind. 299. The broker was the agent of the insurance company. Sec. 1977, R. S.; *Alkan v. N. H. Ins. Co.* 53 Wis. 136. If the agent of the plaintiff, his agency extended only to procuring the insurance. *Hinman v. Hartford Ins. Co.* 36 Wis. 159; *Bourgeois v. Mut. F. Ins. Co.* 86 id. 402; *Stehlick v. Milwaukee M. Ins. Co.* 87 id. 322; *Schauer v. Queen Ins. Co.* 88 id. 561; *Grace v. Am. Cent. Ins. Co.* 109 U. S. 278; *Hermann v. Niagara F. Ins. Co.* 100 N. Y. 411; *Broadwater v. Lion F. Ins. Co.* 34 Minn. 465;

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White v. Connecticut F. Ins. Co. 120 Mass. 339; *Indiana Ins. Co. v. Hartwell*, 100 Ind. 566; *Ins. Co. of N. A. v. Forcheimer & Co.* 86 Ala. 541; *Ins. Cos. v. Raden*, 87 id. 311; *Huggins Cracker & Candy Co. v. People's Ins. Co.* 41 Mo. App. 530.

For the defendants there were briefs by *Barbers & Beglinger*, attorneys, and *Thomas Bates*, of counsel, and oral argument by *C. Barber* and *Thomas Bates*. To the point that the plaintiff was estopped to deny the broker's authority to make the agreement claimed by retaining the policies after knowledge of such agreement, they cited *Atlantic Ins. Co. v. Carlin*, 58 Md. 338; *Reid v. Hibbard*, 6 Wis. 175; *N. W. Iron Co. v. Ætna Ins. Co.* 26 id. 78; *Burke v. M., L. S. & W. R. Co.* 83 id. 410; *Strasson v. Conklin*, 54 id. 102; *Parish v. Reeve*, 63 id. 315.

MARSHALL, J. The findings of fact are to the effect that Winchester was an insurance broker, with all the ordinary authority as such, to procure insurance for plaintiff, subject only to its approval respecting the character of the insurance companies issuing the policies; that, as such broker, he procured for plaintiff three of the policies in question, from defendants' agents, Sunderland & Ostrander, at West Superior, Wisconsin, which, for convenience, we will designate as the first line; that such policies were issued in consideration, in part, of an agreement made with Winchester on plaintiff's behalf, that plaintiff would not take or accept any policy on the same property in either of the defendant companies from any other agent or agents, but that plaintiff did not know of such agreement till after the fire of June 19, 1894. From such facts, the trial court was requested to find, as a conclusion of law, that the plaintiff was bound by the agreement pursuant to which such first line of policies was issued, which request was refused, and a decision made, instead, that the authority of Winchester, though agent for

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plaintiff to procure the policies, was limited to such procurement, and that plaintiff was not bound by the agreement not to take a double line of insurance in the defendant companies. By the learned judge's opinion we are informed that his conclusion was based on the ground that Winchester was a special agent, and that, though in fact the agent for plaintiff, in law he was the agent for defendants, under sec. 1977, R. S.

Leaving out of view the statute, which was evidently very persuasive with the trial court, what the powers of an insurance broker are can hardly be a subject for serious controversy. He is the agent for the assured, according to all authorities on the subject, though at the same time, for some purposes, he may be the agent for the insurer, and his acts and representations within the scope of his authority as such agent are binding upon the assured. Mechem, Agency, § 931; *Hartford F. Ins. Co. v. Reynolds*, 36 Mich. 502; *Standard Oil Co. v. Triumph Ins. Co.* 64 N. Y. 85; *Hamblet v. City Ins. Co.* 36 Fed. Rep. 118; May, Ins. § 124A. Says Mr. Justice Page, in *Am. F. Ins. Co. v. Brooks* (Md.), 34 Atl. Rep. 373: "It appears to be well settled that, where one engages another to procure insurance, the person so employed is agent for the insured, and not for the insurer, in all matters connected with such procurement." Questions involving the scope of the powers of an insurance broker to represent the insured arise most frequently where notice of cancellation is served by the insurer on such broker, when the contract of insurance requires it to be served upon the insured. In such cases the question turns on whether the employment of the broker extended beyond the mere procurement of the insurance. If not, it is held that his agency ceased upon the delivery and acceptance of the policy, so that service of notice of cancellation on him was ineffectual. *Kehler v. New Orleans Ins. Co.* 23 Fed. Rep. 709; *Franklin Ins. Co. v. Sears*, 21 Fed. Rep. 290; *Body v. Hartford F.*

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Ins. Co. 63 Wis. 157; *Hermann v. Niagara Ins. Co.* 100 N. Y. 411; *Grace v. Am. Cent. Ins. Co.* 109 U. S. 278; *Broadwater v. Lion F. Ins. Co.* 34 Minn. 465; *White v. Conn. F. Ins. Co.* 120 Mass. 330; *Indiana Ins. Co. v. Hartwell*, 100 Ind. 566. But the broker may be so clothed with authority as to have full power to act for the insured in canceling, as well as procuring, policies. *Standard Oil Co. v. Triumph Ins. Co., supra; Hartford F. Ins. Co. v. Reynolds, supra.* In all cases the familiar rule respecting the relation of principal and agent applies, that, within the scope of his authority to procure insurance, he stands in the place of the principal, and the latter is bound by whatever, within such scope, such agent may do, to the same extent as if it were done by such principal.

Such is the law pertaining to this subject, unless varied by sec. 1977, R. S., which probably exerted controlling influence with the trial judge. Such section provides that "whoever solicits insurance on behalf of any insurance corporation or property owner, or transmits an application for insurance, or a policy of insurance, other than for himself, to or from any such corporation, or who makes any contract for insurance, or collects any premium for insurance, or in any manner aids or assists in doing either, or in transacting any business of like nature for any insurance corporation, or advertises to do any such thing, shall be held to be an agent of such corporation to all intents and purposes." Obviously, under such section, Winchester, for some purposes, was the agent of the defendants. Such is the effect of *Schomer v. Hekla F. Ins. Co.* 50 Wis. 575, and other cases in this court. He was their agent to deliver the policy. He was their agent in respect to any representations made by him to the plaintiff. He was their agent to receive the premium, and for some other purposes. But that did not prevent him from being plaintiff's agent at the same time in procuring the policy, and in respect to everything which did not conflict

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with the statutory agency for the defendants. 2 Am. & Eng. Ency. of Law, 595. In *Wood v. Firemen's F. Ins. Co.* 126 Mass. 316, where a similar question, under a similar law, was under discussion, Mr. Justice COLT said: "The statute relating to agents of insurance companies does not change the rule of the common law regulating the power of agents to bind their principals;" and further, in effect: The statute cannot be construed so as to prevent the person who is agent for the insurer for some purposes, by virtue of the statute, from being the agent for the insured for other purposes. He may well be agent for each in matters which do not conflict. Sec. 1977, we hold, does not vary the common-law rule respecting the relations of principal and agent, so but that an insurance broker, in the procurement of an insurance policy, may bind his principal in matters pertaining to such procurement, though it clothes him at the same time with power to bind the insurance company, as its agent, in matters within the scope of the statute. The common-law rule exists, notwithstanding the rule of the statute, except where the two conflict, and then the former must give way to the latter.

Applying the foregoing to the facts of this case, no reason is perceived why Winchester did not bind the plaintiff by the agreement he made with Sunderland & Ostrander against a double line of insurance. It was the usual and proper course to pursue to limit the proportion of insurance that each company would carry on plaintiff's property. Plaintiff's officers knew that such was the policy pursued generally by insurance companies, as sufficiently appears from the evidence. They could not have obtained the policies without submitting to such policy. They knew that, when they clothed Winchester with authority to procure the insurance, it must be procured subject to such policy. Therefore they necessarily clothed him with authority to make the arrangement that he did to protect the defend-

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ants, and they are bound thereby, even though they had no notice of the agreement till after the first fire. Moreover, plaintiff's officers, with full knowledge of the facts obtained after the fire of June 19, insisted on taking the benefits of the policies; and, by their conduct in that regard, they ratified the agreement in question, whether it was originally authorized or not. The rule applies that if one, with knowledge of the facts, accepts the benefit of an act done in his behalf by another, he thereby assumes its responsibilities by accepting such benefits, though the act be done without original authority. He makes it his act, and is bound to the same extent as if the same were originally authorized. So held in *Samo v. Gore Dist. M. F. Ins. Co.* 26 U. C. C. P. 405, where, in discussing the subject of whether representations made by a broker in obtaining insurance were binding on the insured by ratification, HAGGERTY, C. J., said, in effect: The plaintiff cannot claim the benefits of an insurance policy obtained by the broker as his agent, and at the same time insist that he is not liable for that agent's statements, on the faith of which statements being true the insurance was effected.

The views above expressed lead to the conclusion that the trial court erred in the decision contained in the first conclusion of law, to the effect that plaintiff was not bound by the agreement made between Winchester and Sunderland & Ostrander to protect defendants against the danger of being held liable upon two lines of policies, and erred in not concluding, as requested by defendants' counsel, that such agreement was binding when made, and also erred in refusing to find, as requested by them, that plaintiff was bound by such agreement by ratification.

It does not necessarily follow from the foregoing that the judgments should be reversed on defendants' appeals, for if, notwithstanding the erroneous conclusion of the trial court, the judgments are yet right on the facts found, or on the

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evidence, they must be affirmed. *Cornell v. Barnes*, 26 Wis. 473; *Sanford v. McCreedy*, 28 Wis. 103. It is therefore important to inquire whether the agreement made with Sunderland & Ostrander that plaintiff would accept but one line of insurance from each of the defendants was waived by them. The evidence shows that the policies obtained of Robert Shields & Son (which for convenience we will call the "second line," to distinguish them from the policies issued at the West Superior agency, which we call the "first line") were ordered by John R. Davis, June 5, 1894; that they were not paid for or delivered till after the fire of June 19, 1894; that, as soon as defendants were informed that the second line of policies had been ordered, they insisted upon one of the lines being canceled, and gave some preference to the second line; that June 19, 1894, after the fire, Sunderland & Ostrander were assured by Winchester that no claim would be made against defendants under any policies, except those issued at their agency; that the next day John R. Davis called on Shields & Son, and paid for and obtained possession of the second line of policies; that, as soon as defendants learned that the second line of policies had been delivered, they ordered Shields & Son to pay back to plaintiff the entire amount of the premiums, and to cancel such policies; that thereupon the agents sent a telegram to plaintiff, to the effect that the policies were canceled, subject to loss; that such telegram was followed by the service of a notice on plaintiff on the 27th day of June, 1894, to the same effect, at which time a tender of the full amount of the premiums was made, accompanied by a demand for a return of the policies; that such tender and request were repeated on the 2d day of July, 1894, and such tender was kept good down to the time of the trial; that plaintiff refused to receive the money tendered, or to comply with the request to return the policies, or to submit to the cancellation thereof, as demanded, or otherwise, except in such man-

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ner as to protect its causes of action for loss on account of the fire of June 19, 1894; and defendants persisted in their position that plaintiff should accept the full amount of the premiums, and return the policies as void from the beginning. It will be observed that defendants' position was consistent only with a determination on their part to rescind the contracts of insurance altogether, and that of plaintiff's officers only with the theory that such position was fully understood by them, and that their intention was not to submit to any cancellation but such as could not prejudice their claims for loss alleged to exist on account of the fire of June 19. The trial court so concluded, and embodied such conclusion in the findings of fact in No. 16, to the effect that, "after the fire of June 19, the defendants insisted upon recalling, revoking, and unmaking the contracts of insurance with plaintiff company, issued by Robert Shields & Son, and treating them as if they had never been in force, and each took the position that that line of insurance was wholly inoperative from its inception." It would seem from this that no claim can be seriously made, but that, if the contract against a double line of insurance was binding on plaintiff when made, or by a subsequent ratification, and it was so binding, it was not at any time thereafter waived. The evidence and the findings of fact are conclusive on this point. From the foregoing it follows that the conclusion of the trial court that defendants are liable upon the second line of policies for the fire of June 19, 1894, cannot be sustained, and that it was rightly decided that they are not liable on such policies for the fire of July 27, 1894.

There is left to be determined on defendants' appeals the questions relating to their liability for loss on the first line of policies for the fire of July 27, 1894. It is claimed on the part of the defendants that such policies were canceled by the proceeding covered by the thirteenth finding of fact, to the effect that, July 7, Sunderland & Ostrander tele-

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graphed Winchester at Phillips, Wisconsin, to cancel such policies; that no premium had been received or would be accepted; that on such date the policies were in the possession of plaintiff; that it owed Winchester therefor, and that he was indebted for the premiums to defendants; that Winchester promptly notified plaintiff of the contents of such telegram; that plaintiff notified Sunderland & Ostrander that only a cancellation under the conditions of the policies would be consented to; that on July 7, 1894, to guard against any question that might arise growing out of payment of the premiums by plaintiff to Winchester, or acts equivalent to such payment, defendants caused the full amount of the premiums to be tendered to plaintiff, and a surrender of the policies demanded.

From what has heretofore been said, Winchester having delivered the policies and his connection therewith as plaintiff's agent to procure the same having ceased, a notice of cancellation served on him was of no value. Though if he were so circumstanced that if a notice of cancellation served upon him would have been effectual, no such notice was served. He was directed *to cancel* the policies. If that gave him authority to make the cancellation, or to give the proper notice of cancellation to plaintiff, he did not exercise it. In fact, there does not appear to have been any effort to cancel the policies under the conditions contained in the contract. The law is well settled that a policy of insurance cannot be canceled under the provisions in that regard, unless such provisions are strictly followed. The right of cancellation does not exist at all except by contract, and a clause in that regard is in the nature of a condition precedent, which must be strictly complied with in order to make an effort to cancel effective to accomplish its purpose. *Van Valkenburgh v. Lenox F. Ins. Co.* 51 N. Y. 465. There must be an actual notice of cancellation, within the meaning of the policy, not a mere notice of a desire to cancel or a no-

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tice that the policy will be canceled, or a notice to cancel; and the notice must be served on or given to the proper person, and a tender of the unearned premium must be made for the purpose of meeting the condition of the contract. Nothing short of that will do. Wood, Fire Ins. § 113; *Mohr & Mohr Distilling Co. v. Ohio Ins. Co.* 13 Fed. Rep. 74; *Quong Tue Sing v. Anglo-Nevada Ass. Corp.* 86 Cal. 566. As stated by the learned circuit judge in his opinion, relating to the second class of policies, an excessive tender does not render it ineffective, but with this modification, for the purposes for which such tender is made; but a tender and demand for a surrender of the policies, made for the purpose of a rescission and refused on that ground, cannot operate as a sufficient tender to effect a cancellation under the terms of the policy. Any other rule would be dangerous and inconsistent with the whole theory of a cancellation by contract. To effect such a cancellation, the minds of the parties must meet, the same as in respect to any other contract; hence a tender and demand for the purpose of canceling a policy from the beginning, refused on that ground, will form no legitimate basis whatever upon which to claim a cancellation pursuant to the condition contained in the policy. Where the policy provides that it may be canceled on notice and payment of the unearned premium, such provision is in the nature of a continuing, irrevocable offer, and when accepted, according to its terms, a new contract is made, which terminates the policy from the date of such acceptance. Under each of the policies in question, plaintiff was bound by such an offer to submit to its cancellation, to take effect at the date of its acceptance. Such an offer has never been made or accepted as to either of such policies, but a demand for a cancellation of the policies from the beginning was made, which was refused. The minds of the parties never met on the subject of cancellation pursuant to the contracts; hence the condition precedent contained therein,

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the performance of which was requisite to the cancellation defendants now contend for, has never been performed.

The trial court found that defendants are liable on the first policies for the fire of July 27, because of the payment of the premiums to Winchester, July 23; that such payment operated as a waiver of the cancellation of the policies if such cancellation had theretofore taken place. Such findings were excepted to, but, as they are only made on the theory that the policies were canceled prior to such payment (and we have found that they were not), it is unnecessary to consider the assignments of error predicated thereon.

A further claim is made on defendants' appeals that each judgment was entered for $318.54 in excess of the amount ordered at the foot of the findings. Such claim may not be exactly correct, but a computation of the interest that we have made sufficiently shows that there was a serious error made by the plaintiff in that regard, and that such error is approximately as claimed by defendants.

The result of the foregoing is that plaintiff's appeals from the judgments to the effect that no recovery can be had on the policies obtained of Robert Shields & Son, June 20, 1894, for the fire of July 27, 1894, must be affirmed; and that, on defendants' appeals, the judgments must be reversed as to the recovery on the second line of policies for the first fire, and on the second line of policies for error in computing interest, and the cause remanded with directions to enter the proper judgments in conformity herewith, as indicated in the mandate.

By the Court.— That part of each judgment appealed from by plaintiff is affirmed; and on defendants' appeals the judgments are reversed, and the cause remanded, with directions to enter judgments in favor of the plaintiff for $1,090.88, with interest thereon at the rate of six per cent. per annum from September 19, 1894, and $3,576.49, with interest thereon at the same rate from the 17th day of No-

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vember, 1894, with costs as taxed in that court, against the defendant *Hartford Fire Insurance Company of Hartford, Connecticut*, and a like judgment against the *National Fire Insurance Company of Hartford, Connecticut*, and a like judgment against the *Phœnix Assurance Company of London*. Full costs are allowed to each of the defendants in this court on the two appeals from the judgments against such defendant, except that only one third of defendants' costs for printing on their appeals shall be taxed in each judgment on such appeals, and one third of defendants' costs for printing on plaintiff's appeals shall be taxed against plaintiff in each judgment on such appeals.

PIENING, Assignee, Appellant, vs. ENDRESS and others, Respondents.

January 16 — February 2, 1897.

Action by assignee to recover notes fraudulently transferred: Finding sustained.

1. A purchase of notes from a bank by a depositor, he paying therefor with his check on such bank, though made but a few days before the failure of the bank, will not be held fraudulent in an action by the assignee of the bank to recover such notes, if the transaction is proved to have been conducted in good faith on the part of the purchaser, without knowledge of the insolvent condition of the bank, or of any fraudulent intent on the part of its officials, and without notice of any facts which should have put them upon inquiry.
2. A finding in such action that the transfer was not fraudulent will not be disturbed on appeal, if there was sufficient evidence to support it, though there was evidence which might have sustained an opposite finding.

APPEAL from a judgment of the circuit court for Manitowoc county: N. S. GILSON, Circuit Judge. *Affirmed.*

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Piening vs. Endress and others.

This is an action in equity, brought by the assignee of the T. C. Shove Banking Company, to recover certain promissory notes alleged to have been fraudulently transferred to the defendants *Endress* by said banking company just prior to its assignment for the benefit of creditors. The notes in question were two in number, and were dated, respectively, on the 7th and 9th of January, 1892, due on the 9th and 11th of April, respectively, following, and were in the sum of $2,000 each. They were made and signed by the firm of *William Rahr's Sons*, a business firm at Manitowoc, and were discounted and owned by the banking company up to the time of the transfer to the defendants *Endress*. The answer of the defendants admitted their purchase of the notes from the bank on April 9, 1892, and alleged payment for the same by check at the time of the transfer. The makers of the notes, the *William Rahr's Sons*, were also made defendants in the action, and judgment for the amount of the notes asked against them. They answered, admitting their liability on the notes to the owner thereof, and their readiness to pay to the true owner, but alleged that they could not with safety pay either to the assignee of the bank or to the defendants *Endress*, and they prayed that the notes be brought into court and filed. It appeared on the trial that the T. C. Shove Banking Company, of Manitowoc, was actively engaged in the banking business for many years, up to the 12th day of April, 1892, at which time it made an assignment for the benefit of its creditors to the plaintiff; that it was in fact insolvent on the 1st day of April, prior to the failure; that at that time, and at the time of the assignment, the Manitowoc Manufacturing Company was indebted to the bank in the sum of more than $200,000; that, on the night of the 11th of April, the entire plant of the company was destroyed by fire; and that the assignment made by the bank on the following day was directly caused by the destruction of the factory. On the 9th of April, and for a long time prior

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thereto, the defendants *C. W. Endress* and his two sons, constituting the firm of C. W. Endress & Sons, had deposits on book account in the bank amounting to $2,607.74. The defendant *C. W. Endress* individually had also a deposit in addition, amounting to $876.13. At this time, and for some time prior thereto, one A. J. Endress, a son of *C. W. Endress*, was assistant cashier of the banking company, but was not a member of the firm of C. W. Endress & Sons. Either on Saturday, April 9, or on Monday, April 11, the *Rahr* notes were purchased by C. W. Endress & Sons of the bank, acting through its assistant cashier, A. J. Endress. Payment therefor was made by check of C. W. Endress & Sons, drawn on the bank against their deposits, for $4,084; the check being drawn and signed by A. J. Endress, by authority of his father, *C. W. Endress.* At or about the same time, and by like authority, A. J. Endress had drawn a check on behalf of his father, transferring $800 of his father's individual account to the account of Endress & Sons. By the drawing of the check for $4,084, the firm account was overdrawn to the amount of $863.82; and on the 14th day of May, 1892, that overdraft was paid by the firm of Endress & Sons to the assignee. It is alleged in the complaint that the assignee received this fund inadvertently, without consultation with his counsel. He, however, retained the same until March, 1893, when he demanded in writing, from Endress & Sons, return of the notes, and offered to correct the account, and to return the $863.82 paid, and permit them to file their claim as general creditors of the bank.

The court found, in effect, that on April 9, 1892, Endress & Sons purchased and received the notes from the bank, and paid $4,000 therefor, without knowledge or reasonable cause to believe that the bank was insolvent, and without notice of any fact affecting the fairness of the sale and that they were purchasers in good faith for value before the banking company failed and made the assignment; that, in

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making the sale, A. J. Endress, assistant cashier, a director and stockholder of the bank, acted as agent of the bank, and not as agent of Endress & Sons. Upon these findings, the complaint was dismissed upon the merits, and the plaintiff appealed.

For the appellant there were separate briefs by *G. G. Sedgwick* and *Schmitz & Kirwan*, and oral argument by *Michael Kirwan*. They contended that the transfer of the notes to the defendants *E.* was fraudulent as to other creditors, because it gave them a preference. *Batten v. Smith*, 62 Wis. 92, 98; *Valley Lumber Co. v. Hogan*, 85 id. 366, 370; *Lawson v. Stacy*, 82 id. 303. They had reason to believe the bank to be insolvent, and were chargeable with knowledge of its condition, their agent being one of its officers. *Otis v. Hadley*, 112 Mass. 100; *Nolte v. Hulbert*, 37 Ohio St. 447; *Cragie v. Hadley*, 99 N. Y. 131; *Brothers v. Bank of Kaukauna*, 84 Wis. 381, 395; *Gillett v. Phillips*, 13 N. Y. 114, 117.

For the respondents there was a brief by *Nash & Nash*, and oral argument by *L. J. Nash*.

WINSLOW, J. The questions in this case were purely questions of fact, or of inferences to be drawn from facts. If the transactions between C. W. Endress & Sons and the bank (acting through its assistant cashier, A. J. Endress), on the 9th or 11th of April, 1892, by which the notes were transferred and delivered to Endress & Sons, and their check received in payment therefor, were conducted in good faith on their part, without knowledge of the insolvent condition of the bank, or of any fraudulent intent on the part of its officials, and without notice of any fact which should have put them on inquiry, then the transaction must be sustained. There was sufficient evidence to sustain such findings, and the trial judge believed the evidence, and so found. It is true that many facts appeared which tended to throw grave suspicion about the transaction, and, had the findings

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been that the transfer was fraudulent, we probably should have been entirely satisfied with them. But it cannot be said that the findings are clearly against the preponderance of the evidence; hence we cannot disturb them.

By the Court.— Judgment affirmed.

In re Guardianship of Gertrude Klein.

January 16—February 2, 1897.

Guardianship: Jurisdiction of the circuit court.

In a proceeding under sec. 4587*b*, S. & B. Ann. Stats., to remove a child from the custody of his parents, guardian, etc., on proof that the physical or moral welfare of the child is endangered by the neglect, abuse, etc., of such parent, etc., and to provide him a home elsewhere, the county judge acts as a mere magistrate, and not as a court; and his order in such a proceeding is no bar to the exercise by the circuit court of its general equity jurisdiction over infants by appointing another person as guardian and awarding to him the care and custody of the infant. Such action by it involves no conflict between courts of concurrent jurisdiction in the matter of appointing guardians.

Appeal from an order of the circuit court for Sheboygan county: N. S. Gilson, Circuit Judge. *Affirmed.*

On the 21st of November, 1894, *Ira A. Bean* presented to the judge of the circuit court for Sheboygan county a petition in that court, while said judge was holding court in Fond du Lac county, representing that Gertrude Klein, a minor, born March 5, 1890, was residing in the county of Sheboygan; that *Nicholas Klein*, her father, was an habitual drunkard, residing in the city of Sheboygan, and was not a fit and proper person to have the care and custody of said minor, and that she had been taken from his custody by order of the county judge of Sheboygan county, pursuant

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to sec. 4587*b*, S. & B. Ann. Stats.; that the mother of said minor was dead, and that on or about October 20, 1894, it was given to the custody of the petitioner by the humane agent of the city of Sheboygan, and had ever since been in his care and custody; that petitioner and his wife had become very much attached to said child, and said child to them; that he had no children, and was able and desirous of keeping said child, and providing her with a good home; that while said child was in his care and custody the county judge of Sheboygan county made an order that she be turned over to another person; that, other than the home of the petitioner, said child had no home and no relative who was willing or able to provide her with a home; that the personal estate of the minor did not exceed $50 in value, and that she had no real estate; that, to protect and preserve the legal rights of said minor, and to provide for her future welfare, it was necessary that some proper person be appointed guardian of her person and estate, during her minority,—and prayed that he be appointed accordingly. A hearing of said petition was ordered to be had at a term of said court to be held at the courthouse in Fond du Lac, December 3, 1894, and that ten days' previous notice be given to *Nicholas Klein*, the father, of the time and place of such hearing.

At the time and place appointed, *Nicholas Klein*, the father, appeared, and demurred to the petition, and objected to the jurisdiction of the court, that the petition failed to state facts sufficient to give the court jurisdiction, and that the county court for Sheboygan county was the proper court to act in the matter, in which court a petition had been filed for the adoption of said minor, and also that an order had been made, July 24, 1894, by the county judge of that county, awarding the custody of said infant to suitable parties, namely, its grandparents; that on the 24th of October, 1894, said county judge, upon hearing, upon due notice,

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made a supplemental order, awarding the custody of said infant to a proper person other than her father; and that thereafter, on the 22d of November, 1894, and before service of the notice of hearing of the present petition, the county judge, after due notice and hearing, made a further supplemental order, awarding the custody of said infant to another proper and suitable person, to wit, *Mrs. Gertrude Brosey*, an aunt of said infant, residing in Sheboygan, Wisconsin,—and it was insisted that, at the time of filing the petition in this matter, the county judge of Sheboygan county had acquired, and still retained, full and complete jurisdiction and custody of the person of said infant, and no appeal or other proceeding had been taken to reverse or set aside such proceedings so relied on.

The court overruled the demurrer, and the said *Nicholas Klein* answered, setting up the proceedings before the county judge and in the county court, and alleging that the custodian last named, *Gertrude Brosey*, was a competent and suitable person to have the care, custody, and education of said infant.

A trial of the issues was commenced in the circuit court at Fond du Lac, and subsequently completed in the circuit court at Manitowoc, in an adjoining county, February 12, 1895. At the trial *Gertrude Brosey* intervened, and participated in the proceedings. The court found, substantially, that the allegations of the petition were true; that said infant was removed from the custody of *Nicholas Klein* because he was an habitual drunkard, and not a fit person to have its care or custody; that said *Gertrude Brosey* was not a fit or suitable person to be appointed its guardian; that the petitioner, since October 27, 1894, had had the care and custody of said infant, and was a fit and suitable person to be appointed such guardian, and he was accordingly appointed guardian of the person and estate of said infant. Said *Nicholas Klein* and *Gertrude Brosey* appealed from the

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order. At the hearing in the circuit court, the proceedings before the county judge of Sheboygan county, and also in the county court for that county, were produced in evidence by the respondents, and evidence was given to show that *Nicholas Klein* was an habitual drunkard, and not a fit or suitable person to have the care and custody of said infant. The testimony was mainly directed to the question whether *Mrs. Gertrude Brosey* was a fit and suitable person for that purpose, and on this subject it was conflicting.

For the appellants there was a brief by *D. T. Phalen* and *L. J. Nash*, and oral argument by *Mr. Nash*. They argued that courts of equity will not usually appoint guardians where no necessity appears, and the probate court can afford complete relief. *Willis v. Fox*, 25 Wis. 646; *Lannon v. Hackett*, 49 id. 261, 272; *Catlin v. Wheeler*, id. 507, 521; *Kugler v. Prien*, 62 id. 248; *Hawley v. Tesch*, 72 id. 299. The county court having made the child its ward, the circuit court ought to have declined to act, and thus avoid a conflict of jurisdiction. *Wood v. Lake*, 13 Wis. 84; *Platto v. Deuster*, 22 id. 482; *Orient Ins. Co. v. Sloan*, 70 id. 611; *In re Globe Ins. Co.* 6 Paige, 102; *In re Kennedy*, 5 id. 244.

For the respondent the case was submitted on the brief of *C. H. Maynard* and *Francis Williams*.

PINNEY, J. 1. The proceedings before the county judge of Sheboygan county, by which *Nicholas Klein* was deprived of the custody of his infant daughter, Gertrude, and she was given into the custody of Mr. and Mrs. John Thomas, her maternal grandparents, and the succeeding orders, made by said county judge, changing such custody (1) to Mr. and Mrs. Blenski and (2) to *Mrs. Gertrude Brosey*, did not constitute any valid objection to the jurisdiction of the circuit court to hear and determine the present petition. The statute under which the proceedings before the county judge were had (S. & B. Ann. Stats. sec. 4587*b*) provides that,

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"whenever proper affidavit shall be made before any county or municipal judge, in any county in the state, that the physical or moral welfare of any child in such county is seriously endangered by the neglect, abuse, or the vicious or immoral habits or associations of its parents, or parent, guardian, or by any person having the custody of such child, or that the physical or moral welfare of any such child is seriously endangered by the inability, refusal or neglect of such parents, parent or guardian or custodian to properly care for such child, it shall be the duty of such county or municipal judge to summon witnesses as to the facts set forth in such affidavit; and also such parents or parent, guardian or custodian of such child; and if the proofs be sufficient to establish the facts set forth in such affidavit, and to warrant public interference with the *custody* of such child, it shall be the duty of such judge to cause such child to be removed from the custody of such parents or parent, guardian or custodian, and provide with a home, or such place for safe keeping and provision of such child as may be available, and in his judgment most suitable;" and declares that "it shall be unlawful for said parents or parent, guardian or custodian to interfere with or remove such child from the place so provided, without the consent of such county or municipal judge;" and it also provides that it shall be a penal offense for any person to entice any child away from the place provided for it, or to interfere in any manner whatever with the care, custody, control, personal liberty, or education of any child so removed from its parents, etc. This statute is founded upon the police power of the state,—upon "the political necessity and duty of the sovereignty to make provision for the care of subjects or citizens unable for any cause to take care of themselves, and destitute of other care, too long recognized in all civilized countries, and too well established under the state governments of this country, to be an open question." *Milwaukee Industrial School v. Mil-*

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waukee Co. 40 Wis. 331. The statute in question is similar in its purposes, and justifiable on the same grounds, as the statute held valid in that case. The deprivation of custody, by reason of the order made under it, is not permanent; but, when a parent or guardian may be able to show that the ground of deprivation no longer exists, and that he is not an unsuitable person for the custody of the child, his right to it will prevail, and the order of the judge, which for the time being precludes him from such custody, should be regarded as having served its purpose, and he will be restored to the custody of the child, by *habeas corpus* or other appropriate remedy.

The proceeding before the county judge, although judicial in its character, was before him as a magistrate, and was not one in any court known to the law. It was, therefore, no bar to the appointment of the guardian by the circuit court, in the proper exercise of its general equity jurisdiction over infants. "In addition to appointing guardians, the court of equity will, in a proper case, and to promote the highest welfare of the infant, where there is already a guardian, natural or legal, interfere, by controlling the person of the infant, and by removing it personally from the custody of its natural or legal guardian, even from the custody of its own parents" (3 Pomeroy, Eq. Jur. § 1307); and the court will not only remove guardians appointed by its own authority, but it will remove testamentary or statute guardians or custodians, whenever a sufficient cause can be shown for such purpose, and whenever it appears that the guardian is abusing his trust, or it may take the child from one custodian and give it to another (2 Story, Eq. Jur. § 1339; 2 Beach, Mod. Eq. Jur. § 1026; *Glasscott v. Warner*, 20 Wis. 654). The circuit courts, by sec. 8, art. VII, of the constitution, took the original jurisdiction possessed by courts of chancery, and this included the jurisdiction in question, which has not since been prohibited by law; and hence the jurisdiction

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conferred upon the county court by R. S. secs. 3962–3964, is concurrent with that of the circuit court upon the same subject. The power of a court of equity to remove guardians or custodians of infants is sustained by numerous well-considered cases. *Wilcox v. Wilcox*, 14 N. Y. 575; *Cowls v. Cowls*, 8 Ill. 435; *Disbrow v. Henshaw*, 8 Cow. 349; *People ex rel. Johnson v. Erbert*, 17 Abb. Pr. 395; *Hill v. Hill*, 49 Md. 450; *Bowles v. Dixon*, 32 Ark. 92. In Hochheimer, Custody of Infants, § 15, the entire subject is well considered, with numerous citations of adjudged cases. The application for adoption in the county court was made by the petitioner and his wife, and the county court denied it, because the father, from whose custody the infant had been taken under the previous order of the county judge, withdrew his consent. The application to the county judge by *Mrs. Brosey*, to be made the custodian under sec. 4587*b*, S. & B. Ann. Stats., was made November 20, and granted November 22, 1894, while the infant was in the custody of the petitioner, where she has since remained. As already observed, the proceeding under that section was not in any court, but a mere police proceeding before the judge as a magistrate. There was no conflict between courts having concurrent jurisdiction to appoint a guardian, and no interference by one court with another of matter already within the appropriate jurisdiction of another court, within the rule stated in *Cardinal v. Eau Claire L. Co.* 75 Wis. 404, and cases there cited. The circuit court, by virtue of its inherent jurisdiction in equity over infants, and its supervisory jurisdiction over inferior courts and tribunals, may, in a proper case, remove a guardian regularly appointed, even by the county court. In *Willis v. Fox*, 25 Wis. 646, it was said that "a court of equity should not exercise its jurisdiction, except in extraordinary cases, or when some special reasons are shown to exist why the matter should be withdrawn from the probate court." In *Batchelder v. Batchelder*, 20 Wis. 452, and *Meyer v. Garth-*

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waite, 92 Wis. 571, 573, the court has held that the circuit court should decline to take jurisdiction, even of a cause of action which is within its general equity jurisdiction, notwithstanding the question of jurisdiction has been waived by omitting to raise it by answer or demurrer. We think that the rule laid down in these cases is correct, as a matter of practice and sound policy, and should not be departed from, particularly as appeals from orders made by the county courts are quite liberally allowed. The rule is founded upon the ground that there is a proceeding already pending in a court of competent jurisdiction to afford complete relief, and that an independent action for that purpose is wholly unnecessary, and therefore will not be sustained. But, in the present case, when the petition was presented to the circuit court, no application had been made to the county court to appoint a guardian for the infant, and there was no obstacle to the exercise by the circuit court of its concurrent jurisdiction. The objection to the jurisdiction of the circuit court cannot, therefore, be sustained.

2. We perceive no sufficient reason for arriving at a different conclusion on the facts than those reached by the circuit court. It would serve no beneficial purpose to state or review the evidence. While it would have been desirable to have appointed as guardian some one of the same religious faith as the parents and blood relatives of the infant, yet it does not appear that any such person, competent and suitable, offered to accept the trust. We think, therefore, that the circuit court, upon the whole case, exercised a wise and just discretion, and that the order appealed from should be affirmed.

By the Court.— The order of the circuit court is affirmed.

The state guardianship of children is considered in a note to *Whalen v. Olmstead* (61 Conn. 263), in 15 L. R. A. 593.— REP.

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LAMB, Respondent, vs. STONE and others, Appellants.

January 18 — February 2, 1897.

Arrest by game warden: Assault and battery: Damages: Evidence.

1. In an action for assault and battery and false imprisonment, against a game warden who arrested the plaintiff without a warrant, charging him with a violation of the laws for the protection of game, where the issue was whether the shooting of ducks was done in the nighttime, the mere fact that the plaintiff was committing a purely technical trespass by floating in the early morning over the submerged lands of a third party cannot be deemed a sufficient provocation to mitigate the damages for an assault and battery by such warden in making the arrest, and therefore evidence of possession of the premises by the owner, and of the posting of notices warning against trespasses, is irrelevant and not admissible.
2. In such an action, where there is some evidence of violence on the part of the officer, a charge that punitive damages may be given for an assault and battery made with circumstances of aggravation or cruelty, with vindictiveness or malice, is not erroneous.

APPEAL from a judgment of the county court of Fond du Lac county: A. E. RICHTER, Judge. *Affirmed.*

Action for assault and battery and false imprisonment.

On the 1st day of September, 1893, in the early morning, the plaintiff was discovered by the defendants, in a boat floating upon the waters of an expansion of Rock river, in what is known as "Horicon Marsh." They supposed he was there for the purpose of shooting wild ducks. The defendants, one of them being a deputy game warden, at once arrested him, as they stated at the time, for violating the game laws by "shooting in the nighttime." They disarmed him of his fowling piece with some violence, and, after a brief detention, let him go. He brings this action for damages, as for an assault and battery and false imprisonment. The defendants answer by a general denial, and allege that they, "being at the time deputy game wardens, and acting as

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such in the preservation of the game of the state, arrested the plaintiff for violating the laws by shooting in the nighttime." There was a verdict for the plaintiff for $100. From judgment on that verdict this appeal is taken.

The cause was submitted for the appellants on the brief of *Malone & Bachhuber* and *F. M. Lawrence*, and for the respondent on that of *C. E. Hooker*.

Counsel for the appellants contended that the defendant *Klieforth*, as game warden, had a right to arrest the plaintiff without a warrant when he saw him in the actual violation of the game laws, also to call others to his assistance. *Keenan v. State*, 8 Wis. 132, 136; ch. 436, Laws of 1891; 1 Am. & Eng. Ency. of Law, 734. He also had a right to order off the plaintiff and to use force. *Lyon v. Fairbank*, 79 Wis. 455; *Harvey v. Brydges*, 14 Mees. & W. 442. Upon the question of damages evidence of notice not to trespass was competent, as showing provocation. *Morely v. Dunbar*, 24 Wis. 183, 187; *Hoffman v. Eppers*, 41 id. 251; *Wilson v. Young*, 31 id. 574.

NEWMAN, J. The answer in effect admits the arrest of the plaintiff by the defendants, and justifies it on the ground that they had detected the plaintiff in the act of violating the laws for the protection of game "by shooting in the nighttime." The issue made by the answer was whether the plaintiff was, at the time of the arrest, violating the law by shooting in the nighttime. He admits that he had secured two ducks that morning. The issue was narrowed, on the trial, to the question whether it was in the nighttime. If it was in fact in the nighttime, he might be lawfully arrested by them; otherwise, not. The issue was a narrow one. The evidence must be confined to the issue. It was irrelevant to this issue whether there were notices to warn against trespassing, as well as whether the plaintiff was, in law, technically a trespasser; nor could so purely technical and

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constructive a trespass as floating in a boat over the lands of third parties, which were under the water, be such a provocation as should legitimately mitigate the damages of a real assault and battery. So the trial court did not err in excluding evidence relating to such matters. Whether the owners of the land, or their agents, might remove the plaintiff, using no more force than was necessary, was a question not involved, for no such defense was pleaded. Special instructions, relating to such unpleaded defense, were rightly refused.

The court gave instructions which covered the issue made by the pleadings and evidence fully, clearly, and satisfactorily. They were, in effect, that if the plaintiff was found by the defendants, shooting ducks in the nighttime, the defendants were justified in arresting him; otherwise, not. That covered the whole issue. What it would be lawful to do in a case of merely technical trespass was not involved. Arrest without a warrant, for a felony, may be justified upon reasonable grounds of belief; not so for a mere trespass or misdemeanor, except when so provided by statute. The court instructed the jury that, if they should find that the assault and battery was inflicted "under circumstances of aggravation or cruelty, with vindictiveness or malice," they might "award exemplary damages by way of punishment to the defendants." This was right. *Nichols v. Brabazon*, 94 Wis. 549. The verdict is not so large as to require it to be set aside as excessive.

By the Court.— The judgment of the county court of Fond du Lac county is affirmed.

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WOLFF, Appellant, vs. BLUHM and others, Respondents.

January 13 — February 2, 1897.

Duress, what constitutes.

A mere threat, by the father of a girl of the age of fifteen years, to prosecute criminally a married man who had unlawfully caused her to become pregnant, unless he would give a note and mortgage to provide for the care of her and her child, does not constitute duress which will avoid the securities given by him in compliance with the demand, where it appears that he did not execute them until several days after the threat and after he had consulted with friends, who advised him to settle.

APPEAL from a judgment of the circuit court for Sheboygan county: N. S. GILSON, Circuit Judge. *Reversed.*

Defendants *Gottfried Bluhm* and *Eliza Bluhm* were husband and wife. *Gottfried Bluhm* was charged by the father of one Ida Nell, a young girl of the age of fifteen years and unmarried, with being the father of a child with which she was pregnant. For the purpose of providing for the care of the girl and of the child, *Gottfried Bluhm* executed and delivered to *August Wolff*, as trustee, a note dated June 21, 1894, for $300, payable in instalments, and to secure the payment of the same the *Bluhms* executed and delivered to such trustee a real-estate mortgage. The maker failed to pay the note according to its terms, and thereupon this action was brought to foreclose the mortgage. An answer was interposed to the effect that the note and mortgage were obtained by duress and were void on that account. The case turned on the truth of the allegations of the answer, in that regard. The court found in favor of the defendants. The court further found that *Gottfried Bluhm* was the father of the child of Ida Nell, and that such fact constituted a good consideration for the note and mortgage, but that the same

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were void because of the manner in which they were obtained. Proper exceptions were filed to preserve for review the questions treated in the opinion. Judgment was entered canceling the note and mortgage, and for costs in favor of the defendants, and from such judgment this appeal was taken.

The cause was submitted for the appellant on the brief of *Simon Gillen* and *Martin Hughes*, and for the respondents on that of *C. H. Maynard*, attorney, and *M. C. Mead*, of counsel.

MARSHALL, J. The sole question here is, Does the evidence warrant the finding that the note and mortgage were obtained by duress? That *Gottfried Bluhm* was the father of the child with which the girl, Ida Nell, was pregnant, that he was so charged, and was threatened with criminal prosecution unless he gave such note and mortgage to provide for the care of the girl and the child, and that he complied with such demand, appears by the findings, and is well supported by the evidence; yet all this does not necessarily constitute duress. The evidence shows that William Nell, the father of the girl, went to *Bluhm's* house, June 17, 1894, and accused the latter of having been intimate with his daughter, and demanded $500 to settle the matter, stating that unless such sum was paid he (*Bluhm*) would be sent to Waupun; that *Bluhm*, the same day, talked the matter over with the girl and her father; that she would not say anything about it; that Nell, after seeing Joseph Klahn, proposed to *Bluhm* that he should pay $300, stating that Klahn would pay $200; that, on the 20th day of June, *Bluhm* talked the matter over with *August Wolff*, a member of the board of supervisors of the town, who advised him that he might be sent to Waupun, and that he had better settle, or go and see a lawyer and be guided by him; that,

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on the 21st day of June, *Bluhm* visited L. A. Bartlett, a merchant at Cascade, and advised with him respecting the matter, the result of which was that Bartlett advised a settlement, and thereupon the settlement complained of was arranged, under Bartlett's direction, at whose suggestion *Mr. Wolff* was made trustee for the benefit of the girl and Nell, who proposed taking care of her and the child. The note and mortgage were executed to consummate such settlement. *Bluhm* had plenty of time, it will be observed, and the amplest opportunity, to consult with disinterested friends and with a lawyer, if he desired, before coming to a conclusion. It is very clear to our minds that he did not act under duress. His will was not overcome, in a legal sense. He was free to do as he saw fit at all times,—to come and go as he chose; and after being fully advised, so far as he desired, by his own friends and neighbors, he executed the papers in suit. Duress exists when one, by the unlawful act of another, is induced to make a contract, or to forego some act, under circumstances which deprive him of the exercise of his free will. 6 Am. & Eng. Ency. of Law, 64–69; *City Nat. Bank v. Kusworm*, 91 Wis. 166. It is not the threat of criminal prosecution in any case that constitutes duress, but the condition of mind produced thereby. The threat must be of such a nature, and made under such circumstances, as to constitute a reasonably adequate cause to control the will of the threatened person, and must have that effect, and the act sought to be avoided must be performed by such person while in such condition. A threatened lawful arrest or prosecution, which does not imply harsh or unusual use of criminal process, and where no warrant has been issued and there is no danger of the threat being immediately carried out, does not constitute duress. *Harmon v. Harmon*, 61 Me. 227; *Higgins v. Brown*, 78 Me. 473; *Landa v. Obert*, 45 Tex. 539.

In view of the foregoing, obviously, there is an entire fail-

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ure of evidence in this case to support the finding of the trial court that the note and mortgage were obtained by duress.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded with directions to render judgment in favor of the plaintiff according to the prayer of the complaint.

DICKE, Appellant, vs. WAGNER and another, Respondents.

January 18 — February 2, 1897.

Wills, construction of: Probate, effect of.

1. Where two wills made by a testator, the second providing in substance that it should take effect only in case certain bequests in the first were declared void, were admitted to probate together as a will and codicil, *held* that, in the absence of any appeal therefrom, the probate was conclusive upon all parties as to the due execution of both, and that together they constituted the last will and testament of the testator, and that the first was not revoked by the second.
2. A first will provided, "This bequeath above made by me to my said wife I. W. shall not interfere with her right of dower, or be considered as part or parcel of payment of her right of dower or thirds. In case of my death she shall be entitled to all of her dower, thirds, or interest as my widow, in and to all my other property, the same as if the above bequeath had never been made;" and a second will, probated as a codicil, provided: "This bequeath shall not be considered as part payment of her dower interest or thirds in my estate. She shall be entitled, besides the above bequeath, to all under the law in such case made and provided, as my widow, if she shall survive me." *Held*, that these expressions constituted a devise to I. W. of such interest in the testator's land and homestead as she would have been entitled to by statute had she been his lawful wife.

APPEAL from a judgment of the circuit court for Manitowoc county: N. S. GILSON, Circuit Judge. *Affirmed.*

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The facts of the case are fully stated in the opinion.

For the appellant there was a brief by *G. A. Forrest*, attorney, and *A. P. Schenian*, of counsel, and oral argument by *A. P. Schenian*. They took the ground that the second will revoked the bequest of furniture to *I. W.* by the first, in that it expressly omitted reference thereto and limited the total amount bequeathed to her. Where there are conflicting clauses the later one prevails. *Hendershot v. Shields*, 42 N. J. Eq. 317; *Heidlebaugh v. Wagner*, 72 Iowa, 601. The person named as wife was the niece of the testator and therefore could not lawfully be his wife, and was not entitled to dower or homestead rights, and a devise to her of those rights would be void. *De France v. Johnson*, 26 Fed. Rep. 891.

For the respondents the case was submitted on the brief of *Nash & Nash* and *Schmitz & Kirwan*.

CASSODAY, C. J. This is an appeal from a judgment of the circuit court, construing the last will and testament of Ernst Wagner, deceased. It appears from the record: That January 24, 1891, the deceased made his will, wherein and whereby he, in effect, gave, devised, and bequeathed to his wife, *Ida Wagner*, all his household furniture, without any exceptions or reservations; also one certain life insurance policy of $2,000 in the Germania Life Insurance Company of New York, on his life; also one other life insurance policy or certificate of $2,000, issued by the order of I. O. O. F. to him, and on his life, and held by him as a member of the Manitowoc Lodge, No. 194,— said policies to be paid to her at the time of his death, or as soon thereafter as adjusted. That such bequests should not interfere with her right of dower, or be considered as a part or parcel of payment thereof. That in case of his death she should be entitled to all of her dower, thirds, or interest as his widow, and in and to all his other property, the same as if the above bequests

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had never been made. That on the next day, January 25, 1891, the deceased executed a second will, wherein and whereby, in effect, he gave, devised, and bequeathed to his wife, *Ida Wagner*, the sum of $4,000, to be paid to her out of his estate as soon after his death as it could be done, such bequest not to be considered as part payment of her dower interest or thirds in his estate. That she should be entitled, besides the above bequests, to all under the law in such case made and provided as his widow, if she should survive him. That such last will was to take the place of his will of January 24, 1891, in case that will should be declared invalid on the ground that he had no right to will and assign said life insurance mentioned in the same. That, if the first held good, then the last to be null and void. That such bequest should in no case exceed $4,000. That the testator died August 12, 1892. That October 18, 1892, it was ordered and decreed by the county court that both of said instruments be, and the same were thereby, allowed, admitted to probate, and established as and for the last will and testament of said Ernst Wagner, deceased,— the last executed being admitted as a codicil to the first. That no appeal was ever taken from that decree so admitting said instruments to probate. That upon the requisite petition and hearing of the parties the county court, July 18, 1893, made a decree, in writing, construing the will so admitted to probate. That thereupon the appellant and another — two of the children and heirs at law of said deceased — appealed from such decree so construing the will to the circuit court. That, upon a trial and hearing had, the circuit court found as matters of fact all of the facts found by the county court which constituted a part of the basis for its judgment in this matter; and as conclusions of law found, adopted, and held the same conclusions of law as had formed a part of the said judgment of said county court, and that the respondents were entitled in this matter to a judgment affirming in all

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respects the said judgment of the county court, and for the costs of such appeal; and ordered judgment accordingly. From the judgment entered thereon accordingly the plaintiff, as such heir at law, brings this appeal.

The probate and allowance of the two written instruments in the county court, as provided by statute, no appeal having been taken therefrom, is conclusive upon all parties as to the due execution of the two instruments,—the first as a will and the second as a codicil; and that they together constituted the last will and testament of the deceased. R. S. sec. 2294; *Newman v. Waterman*, 63 Wis. 612. Error is assigned because the court construed the will as bequeathing to *Ida* the household furniture. This is based entirely on the theory that the second will revoked and set aside the first will. But the probate of both instruments is conclusive against the appellants. As the household furniture was expressly bequeathed to *Ida* by the first will, and there is nothing inconsistent with such bequest in the second will, it is conclusive upon the parties. The manifest purpose of executing the so-called second will was, as expressly indicated therein, that the testator was fearful that the first will would be ineffectual to transfer to *Ida* the insurance therein mentioned, and so, in place of such insurance, he bequeathed to her $4,000 by the second will.

Error is assigned because the court adjudged to *Ida* homestead and dower rights. As *Ida* was the daughter of the testator's own sister, it is conceded that his marriage to her was, under the statutes, an absolute nullity. R. S. secs. 2330, 2349. This being so, it is manifest that *Ida* could take no homestead or dower right merely by virtue of the statutes; in other words, she can only have such rights by virtue of the will. The exact language of the first will in this respect is as follows: "The bequeath as above made by me to my said wife, *Ida Wagner*, shall not interfere with her right of dower, or be considered as part or parcel of payment of her right of dower or thirds. In case of my death, *she shall be*

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entitled to all of her dower, thirds, or interests as my widow, in and to all my other property, the same as if the above bequeath had never been made." And the exact language of the second will in this respect is as follows: "This bequeath shall not be considered as part payment of her dower interest or thirds in my estate. She shall be entitled, besides the above bequeath, to all under the law in such case made and provided, as my widow, if she shall survive me." We are constrained to hold that these expressions constituted a devise to *Ida* of such interest in the lands and homestead as she would have been entitled to by statute had she been the lawful wife of the testator.

By the Court.— The judgment of the circuit court is affirmed. The taxable costs of the respective parties in this court on this appeal are payable out of the estate.

KUNZE, Appellant, vs. KUNZE, Respondent.

January 18 — February 2, 1897.

Appeal from orders.

An order setting aside a notice of *lis pendens* is not appealable under ch. 212, Laws of 1895.

APPEAL from an order of the circuit court for Fond du Lac county: N. S. GILSON, Circuit Judge. *Appeal dismissed.*

The case is stated in the opinion.

E. Blewett, for the appellant, contended that the right to file a notice of *lis pendens* was an absolute right. *Niebuhr v. Schreyer*, 13 Daly (N. Y.), 546. The statutes of this state give no authority to cancel a *lis pendens* except for a failure for one year to serve the summons. S. & B. Ann. Stats. sec. 3187; sec. 1, ch. 19, Laws of 1893.

For the respondent the case was submitted on the brief of *Duffy & McCrory.*

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WINSLOW, J. The plaintiff brought an action to enforce a money judgment obtained in another state (*Kunze v. Kunze*, 94 Wis. 54), and filed a notice of pendency of action in the office of the register of deeds, stating that the action affected the title to certain described real estate owned by the defendant. The circuit court, upon motion, vacated and set aside the *lis pendens*, and the plaintiff appealed. The appeal must be dismissed. The order is not appealable, under ch. 212, Laws of 1895.

By the Court.— Appeal dismissed.

A motion by the appellant to offset the judgment for costs in her favor on the former appeal against the judgment herein was granted April 7, 1897.

WOLTERS and another, Respondents, vs. THE WESTERN ASSURANCE COMPANY, Appellant.

January 18 — February 2, 1897.

Insurance: Want of effort to save property a defense: Burden of proof.

1. If, by reason of the neglect of the insured to use all reasonable means to save and preserve the property at and after the fire, or of his interference preventing or obstructing the saving of the personal property, any of it is destroyed, such conduct on his part is a defense to an action on the policy to the extent of the value of the property lost in consequence thereof, although there is no stipulation or condition in the policy making that a ground of forfeiture.
2. The burden of proof that the loss of insured property was caused by the neglect or misconduct of the insured in reference to saving the property is on the insurance company setting up that defense.

APPEAL from a judgment of the circuit court for Manitowoc county: N. S. GILSON, Circuit Judge. *Affirmed.*

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This action was brought upon a policy of fire insurance for $2,000,—$1,500 on a frame building and saloon at Two Rivers, Wisconsin; $100 on saloon furniture; $100 on wines and liquors; and $300 on household and kitchen furniture, beds, bedding, family stores, etc. One *Grotegut* was joined as plaintiff, by reason of his mortgage interest in the real estate, amounting to $1,200. The complaint charged the total destruction of the building by fire November 28, 1894, and claimed $481.64 by reason of loss on household furniture, beds, bedding, wearing apparel, etc., and alleged a loss of $285.50 on the stock of wines, cigars, etc. The fire and partial destruction of the personal property were admitted by the answer, but all liability under the policy was denied (1) because it was alleged that the fire was set by the plaintiff *Wolters*, or by his procurement; (2) because *Wolters*, by his conduct at the time of the fire, actively interfered to prevent salvage by neighbors and friends who were present, and that his conduct in that respect was fraudulent, whereby he forfeited any right to recover damages for personal property under the policy. The jury found for the plaintiffs, and assessed their damages at $1,963, that is to say, $463 over and above the insurance on the building, it appearing that the building was totally destroyed, within the meaning of the law.

The undisputed evidence shows that the value of the household and kitchen furniture, utensils, and effects covered by the policy was in excess of $500, and that the damage to them by reason of the fire was $481.64; that the value of the saloon furniture and fixtures before the fire was $294.50, and the loss or damage by reason of the fire, $285.50. So that the loss was far in excess of the amount of the insurance. Evidence was given of facts and circumstances tending to show that the fire was incendiary in its origin, and also to show that the plaintiff *Wolters* absented himself from the fire about twenty-five minutes or half an hour, and tending to

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show that he made no effort to save anything. One witness testified that, when they tried to get into the front door, *Wolters* touched him on the shoulder and said, "'Leave that door shut.' I says, 'Why?' He says, 'I shouldn't take anything out.' I asked, 'Why?' He says, 'If you take it up, you will break it anyway, and I won't get any insurance for it.'" Other witnesses testified to similar facts, and there was sufficient testimony to require that the question whether *Wolters* not only made no effort to save anything, but also whether he actively interfered to prevent friends and neighbors from making any salvage, be submitted to the jury. Plaintiff *Wolters* testified that at the time of the fire he was greatly excited, and after he got dressed,— got some shoes and coat,— there were a couple of fellows at the front door; that he knew not who they were; that they were trying to take some stuff out; that the door was not locked,— was left open; that he made some remark to them about tearing out the things, and, rather than to tear them out, they should leave them in, or something like that; that he could not remember exactly what he did say, something about breaking the furniture or tearing it up; that he was too excited to remember what kind of remarks he made. And he testified to facts and circumstances tending to show that the loss was a fair and legitimate one, so that the whole matter became appropriately a question for the jury. The plaintiffs had judgment on the verdict, and the defendant appealed.

The questions arise upon the instructions of the court asked and refused. The defendant requested the court to instruct the jury that "it was the duty of the plaintiff, at the time of the fire, not only to use all reasonable exertion on his own part, but to encourage other persons to assist in saving as much as possible of the unsaved property from destruction, and if you find that the plaintiff not only omitted and neglected all effort on his part to save any such

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property, but also requested others to desist from saving it, and the evidence fails to show you that reasonable efforts to save such property would have been unsuccessful, then the plaintiff would not be entitled to recover for the loss of any of such property;" but it was refused. The court, after properly submitting to the jury the question whether the plaintiff *Wolters* burned or procured the property insured to be destroyed by fire, charged the jury, in respect to the point involved in the above request, as follows, namely, "That the plaintiff was not entitled, under the evidence, to recover anything for the loss on the stock of wines, liquors, and cigars." And, further, "That the policy under which this property was insured provides that the company shall not be liable for loss caused, directly or indirectly, by the neglect of the insured, *Wolters*, to use all reasonable means to save and preserve the property at and after the fire. If the plaintiff prevented or obstructed the saving of the personal property, so that, in consequence thereof, said property was destroyed or damaged by fire, the insurance company is not liable for such loss; nor is it liable for the loss of any property caused, directly or indirectly, by the neglect of the plaintiff to use all reasonable means to save and preserve the property at the fire and after the fire. Was any of this personal property destroyed or damaged by such neglect of the plaintiff to use all reasonable means to save and preserve the same? If so, what was the value of the property lost by such neglect of the plaintiff? If all the personal property was lost in consequence of such neglect, then the defendant is not liable for the value of any of the personal property whatever. If, however, only a part of the personal property was lost in consequence of such neglect, then what was the value of the property so lost by the negligence of the plaintiff, provided you find the plaintiff did not set fire to his building? That the amount found to be the actual loss on the personal property should be added

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to the value of the building, which is the sum of $1,500, and which the plaintiffs, if they were entitled to recover, were entitled to for loss on the building." Defendants moved the court for a new trial, upon the minutes of the court, for error in the giving and refusing of instructions to the jury, and because the verdict was contrary to the evidence. The motion was denied, and from a judgment entered on the verdict in favor of the plaintiffs the defendant appealed.

For the appellant there was a brief by *Quarles, Spence & Quarles*, and oral argument by *J. V. Quarles*. To the point that it was the duty of the assured to use all reasonable exertions to save the property endangered, they cited *Devlin v. Queen Ins. Co.* 46 U. C. Q. B. 611; *Smith v. Cash Ins. Co.* 1 Pitts. (Pa.), 428; *Willis v. Germania & H. Ins. Co.* 79 N. C. 285. Failure to do so amounts to fraud. *Fleisch v. Ins. Co. of N. A.* 58 Mo. App. 596, 607; *Robinson v. Mercer Co. M. F. Ins. Co.* 27 N. J. Law, 134; *New York M. L. Ins. Co. v. Armstrong*, 117 U. S. 591; *Chandler v. Worcester M. F. Ins. Co.* 3 Cush. 328.

For the respondents there was a brief by *G. G. & C. H. Sedgwick*, attorneys, and *Timlin & Glicksman*, of counsel, and oral argument by *N. Glicksman*.

PINNEY, J. 1. We cannot interfere with the verdict in this case, upon the defendant's contention that it is contrary to the evidence. There was sufficient evidence on all contested points to require the submission of the issues to the jury, and it cannot be said that the verdict is not supported by competent evidence. The weight and credibility of the testimony, and the proper inferences to be drawn from the facts and circumstances in evidence, were for the jury; and the circuit judge appears to have been satisfied with the verdict, and refused a new trial.

2. We think that the instructions to the jury on the subject whether the loss was caused, directly or indirectly, by

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the neglect of the plaintiff *Wolters* to use all reasonable means to save and preserve the property at and after the fire, and also as to the effect of such negligence on the plaintiffs' right of recovery, as well as the fact, if they so found it, that the plaintiff *Wolters* prevented or obstructed the saving of the personal property, are correct. It was submitted to the jury to find what was the value of the insured property lost in consequence of such conduct on his part, if any, and they were told that the defendant would not be liable for the value of the property lost by reason of such neglect or improper interference. It is not claimed that there was any stipulation or condition in the policy by which it would be avoided for such neglect or misconduct. The law does not favor forfeitures, and a forfeiture of the policy cannot be raised, on these grounds, by implication. The most that can be said is that the company would not be liable for any loss caused by the negligence or misconduct of the insured, and, if no loss was so caused, the defendant was not injured thereby, and had no ground of defense by reason of the alleged neglect or misconduct. *Commercial Bank v. Firemen's Ins. Co.* 87 Wis. 297. The instruction asked by the defendant's counsel is faulty, and was properly refused. Instead of resting its partial defense for destruction of the personal property on the legitimate result of the negligence or misconduct of *Wolters*, such partial defense was to be made available to the defendant, by this instruction, not upon the ground that such negligence or misconduct was the proximate cause of the loss, but in the event that the evidence *failed to show* that reasonable efforts to save such property would have been *unsuccessful*, making the partial defense to finally depend, not upon what the evidence showed, but upon what it failed to show. The burden of proof was on the defendant to show that the loss was caused by *Wolters'* neglect or misconduct. *Freeman v. Travelers Ins. Co.* 144 Mass. 572; *Cronkhite v. Travelers Ins. Co.* 75

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Wis. 116; *Aurora F. Ins. Co. v. Johnson*, 46 Ind. 315, 326. The instruction asked was properly refused, and, as the instructions given were sufficiently favorable to the defendant, it follows that the judgment is correct, and must be affirmed.

By the Court.— The judgment of the circuit court is affirmed.

HINKLEY, Appellant, vs. TOWN OF ROSENDALE, Respondent.

January 18 — February 2, 1897.

Highways: Negligence: Instructions.

1. In an action for a personal injury caused by the presence of an old stump eighteen inches high, about eight and one-half feet west from the center of the highway, which had been there eighteen years, it appeared that the plaintiff, who lived on that highway and not far off and knew of the stump, was driving past there on a track west of that which the town authorities had graveled, in the nighttime, forgetful of the stump, when her wheel struck it and she was tipped over and injured. *Held*, that the question whether the presence of the stump there was such negligence as made the town liable for her injury was properly left to the jury.
2. In determining whether the instructions given to the jury were correct and sufficient, the charge is to be construed as a whole and not by detached sentences.

APPEAL from a judgment of the circuit court for Fond du Lac county: N. S. GILSON, Circuit Judge. *Affirmed.*

The action is for the recovery of damages for injuries which the plaintiff received upon one of the highways of the defendant town. At the place of the accident the road was sixty-six feet wide. There were three tracks over which the travel went. One, near the center of the highway, had been worked by hauling gravel upon it. The westerly track was one where teams had gone, to avoid the greater dust, over the turf. No work had been done upon it. At this point

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the ground was level and smooth. On the west side of this westerly track, and twenty inches to two feet from it, and eight and six-tenths feet from the center of the highway, was an old stump, a foot to eighteen inches high. It had been there for eighteen years. The plaintiff lived upon this highway, about eighty rods from the place of the accident. She traveled frequently over this highway, and knew of the presence of the stump. She was driving here on a dark night, forgetful of the stump, when the wheel of her cart struck the stump and upset the vehicle, and the plaintiff's arm was broken. There was a jury trial, and a verdict and judgment for the defendant, from which the plaintiff appeals.

For the appellant there were briefs by *Gary & Forward* and *C. D. McFarland*, and oral argument by *C. D. McFarland* and *S. H. Forward*.

Maurice McKenna, attorney, and *E. S. Bragg*, of counsel, for the respondent.

NEWMAN, J. Three grounds of error are alleged: (1) Instructions refused; (2) instructions given; and (3) new trial denied. The case lacks novelty. The facts are few and simple and easy of comprehension. The legal principles which govern are so well settled by repeated adjudications of this court as to be elementary and familiar. The trial court could not well err, unless through excess of painstaking. The fundamental question was whether the presence of the stump in that place was such negligence as made the town liable for the plaintiff's accident. This question, under familiar principles, was for the jury. The plaintiff asked that it be taken from the jury, by the instructions asked, to the effect that the presence of the stump was negligence, and that, if the plaintiff was herself without negligence, she is entitled to recover. These proposed instructions the court rightly refused to give. On the contrary, it submitted the question of the defendant's negligence to the jury, with ap-

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propriate and accurate instructions. The plaintiff asked, also, special instructions bearing upon the question of the plaintiff's contributory negligence, which the court did not give, in form, as requested, but which it did give, in substance, fairly, in the general charge. The failure to give these instructions as asked is alleged as error.

The following is given as a sample. It is complained especially that the court did not give in the general charge the substance of this sentence, taken from the instructions requested: "What might be negligence in the daytime might not be such in the nighttime." That simply imports nothing but that the darkness may be an element to be considered. What the court said was, among other things to be considered, "You may consider that the time of the accident was in the nighttime." This also imports that the darkness is an element to be considered. It lacks nothing of the substance of the requested instruction.

The plaintiff excepted to the general charge, by piecemeal, to nearly every sentence. Many of the exceptions are little more than verbal criticism, and are too numerous and too attenuated to be examined in detail with profit. Certainly the instructions seem to be fair and free from bias, and to cover the whole case with sufficient clearness and accuracy. They are not so fervidly inclined to plaintiff's view of the case as the proposed instructions, but for that very reason are more to be preferred. The charge is to be construed together, as a whole, and not piecemeal, or by detached portions or sentences. If it is found, as a whole, to be consistent and right in its entire tenor and effect, it is to be upheld, even although it may be subject to minor criticism in some of its subordinate details. This charge well bears that test. There was no ground requiring a new trial.

By the Court.— The judgment of the circuit court is affirmed.

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WEISSELMAN, Plaintiff in error, vs. THE STATE, Defendant in error.

January 19 — February 2, 1897.

Appeal: Jurisdiction of county court of Waukesha county: Security to keep the peace.

A proceeding under ch. 196, R. S., "to prevent the commission of crime," by binding over to keep the peace, is not the trial of a criminal offense, but a proceeding before a magistrate; and an appeal from the final order therein must, under sec. 4827, R. S., be taken to the circuit court. This rule is not changed by ch. 99, Laws of 1891, giving to the county court of Waukesha county concurrent civil and criminal jurisdiction in certain cases, or by ch. 23, Laws of 1895, creating a municipal court in that county and giving to it the criminal jurisdiction of a justice of the peace, and an appeal will not lie from an order of the municipal court in such a case, to the county court.

ERROR to review a judgment of the county court of Waukesha county: M. S. GRISWOLD, Judge. *Affirmed.*

The case is stated in the opinion.

For the plaintiff in error there was a brief by *Ryan & Merton*, and oral argument by *E. Merton*. They contended that sec. 7, ch. 99, Laws of 1891, so amended all laws then in force relating to appeals from justices' courts in *Waukesha* county, that appeals, whether in civil or criminal cases, should be taken to the county court. The municipal court was in fact acting in this matter as a justice's court. If taken to the circuit court the appeal would have been dismissed. *Johnson v. C., M. & St. P. R. Co.* 43 Wis. 431.

For the defendant in error there was a brief by the *Attorney General* and *John L. Erdall*, Assistant Attorney General, and oral argument by the *Attorney General*. They contended that the right of appeal was statutory, and appeals must be taken to the court designated by law. *Western U. R. Co. v. Dickson*, 30 Wis. 389, 392; *Johnson v. C., M. & St. P. R. Co.* 43 Wis. 431.

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WINSLOW, J. The plaintiff in error was arrested on a "peace warrant" issued out of the municipal court for the Eastern district of Waukesha county, under sec. 4818 *et seq.*, R. S. Upon hearing he was bound over to keep the peace, and immediately appealed from the order to the *county* court of Waukesha county, which court dismissed the appeal for want of jurisdiction, whereupon this writ was sued out.

The question whether the county court had jurisdiction of the appeal is simply one of construction of statutes. This was a "proceeding to prevent the commission of crime," under ch. 196, R. S. It was not the trial of a criminal offense. It was a proceeding before a magistrate. By sec. 4827, R. S., an appeal from the final order must be taken to the circuit court of the county. This section controls, unless it has been changed by ch. 99, Laws of 1891, which conferred certain jurisdiction upon the county court of Waukesha county, or by ch. 22, Laws of 1895, which created the said municipal court. Ch. 99, above mentioned, conferred upon the county court of Waukesha county concurrent jurisdiction with the circuit court of all *criminal offenses* not punishable by imprisonment in the state prison, and also provided that *all appeals from judgments* rendered by justices of the peace in *criminal cases* should be taken to the county court, instead of to the circuit court. The order in question was not a judgment in a criminal case, nor was the examination a trial of a criminal offense; therefore neither of the provisions above referred to gives jurisdiction of this appeal to the county court. There are no provisions in the act creating the municipal court which expressly or impliedly repeal the provisions of sec. 4827. The act makes that court a court of record, gives the judge the powers and jurisdiction of a justice of the peace in criminal actions and proceedings; also gives it concurrent jurisdiction with the circuit court in all offenses except murder, and provides that

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its judgments in criminal cases may be reviewed by this court in the same manner as a judgment of the circuit court. The county court properly dismissed the appeal.

By the Court.— Judgment affirmed.

TERRILL, Plaintiff in error, vs. THE STATE, Defendant in error.

January 19 — February 23, 1897.

Homicide: Manslaughter: Murder.

1. Upon a trial for homicide, the court, after charging, as requested by the defendant, that, if the defendant unnecessarily killed the deceased while resisting an assault upon him with intent to do him great bodily injury, they might find him guilty of manslaughter in the second degree, proceeded of its own motion to charge them that "if the defendant was not justified by the law of self-defense in shooting and killing Q. (the deceased), and the killing of Q. was therefore unnecessary and unlawful; and if you are convinced by the evidence beyond a reasonable doubt that when he shot and killed Q. he did so pursuant to an *intent then distinctly formed* in his mind to kill Q., you cannot lawfully find the defendant guilty of manslaughter in the second degree, for the defendant in such case, if he killed Q. from *premeditated design* to kill him, is guilty of murder in the first degree." *Held*, that the latter instruction was manifestly erroneous in failing to distinguish between the intentional and unnecessarily killing under the circumstances stated in sec. 4351, R. S., and a killing when perpetrated by premeditated design to effect the death of the person killed, which would be murder in the first degree. MARSHALL, J., dissents.
2. Where, in such a case, the evidence would have sustained a verdict finding the defendant guilty of manslaughter in the second, third, or fourth degree, in case the defense of justifiable homicide was not substantially made out, *held*, that it was the duty of the court to accurately give to the jury the law of whatever degree of felonious homicide the evidence tended to prove; and to refuse to do so, and in effect to charge them that they must acquit the defendant or else convict him of either murder in the first degree or manslaughter in the second degree, was error.

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Terrill vs. The State.

ERROR to review a judgment of the circuit court for Iowa county: GEO. CLEMENTSON, Circuit Judge. *Reversed.*

The plaintiff in error was tried and convicted, in the circuit court for Iowa county, of the crime of murder in the first degree, upon an information charging him, in the usual form, with having killed and murdered one John Quirk, March 17, 1894. After sentence, he sued out a writ of error.

For the plaintiff in error there was a brief by *Spensley & McIlhon*, and oral argument by *Calvert Spensley*. They took the ground that no such premeditation was shown in this case as justified the jury in finding the defendant guilty of murder in the first degree. The blow given by the deceased to the defendant must have so affected his mind as to render cool deliberation and premeditation impossible. In such a case *express malice* must be shown by extrinsic evidence. *Bivens v. State*, 11 Ark. 455. The defendant acted in self-defense. The force used by him was not so disproportionate to his apparent danger as to show wantonness, revenge, or a malicious purpose to injure his assailant. *Stewart v. State*, 1 Horr. & T. Cases on Self-defense, 193; *Comm v. Drum*, id. 188, 190. The killing was unintentional,—the defendant had no chance to take aim. *Schlect v. State*, 75 Wis. 486; *Keenan v. State*, 8 id. 132; *Perkins v. State*, 78 id. 551, 558; *State v. Bloedow*, 45 id. 279. The court's refusal to instruct the jury that they might find the defendant guilty of manslaughter in the second degree, under sec. 4351, R. S., was error for which the judgment should be reversed. *Doherty v. State*, 84 Wis. 152; *Giskie v. State*, 71 id. 612.

For the defendant in error there was a brief by the *Attorney General* and *John L. Erdall*, Assistant Attorney General, and oral argument by the *Attorney General.*

PINNEY, J. The principal question to be determined is whether the circuit court in its charge to the jury, in point

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of law, fairly submitted the case to their consideration, and properly denied the several requests of the defendant's counsel to instruct the jury as to the law of manslaughter in the second, third, and fourth degrees. It was conceded that the defendant shot and killed Quirk at the time and place alleged in the information, and the contention at the trial was what degree of criminality, if any, on the part of the defendant, ensued in consequence of such killing.

The circumstances were, in substance, that the defendant, the deceased, Stephen Tonkin, John Grace, and William Jackson, the bartender at the saloon of William Collins, where the killing occurred, had spent the entire night of March 16, 1894, and until 5 o'clock in the morning of the 17th, in drinking whisky and beer, and in playing cards for the drinks. They had drunk to excess, and none of them had had any sleep. Jackson, the bartender, then set up a saloon lunch, and they all partook, and still remained at the saloon, a room about forty-one feet long and fourteen feet wide. About half past 9 or 10 o'clock, William Clark, a young man about seventeen or eighteen years of age, and one William Smith came into the saloon. The latter, having some green ribbon, gave pieces of it to Clark and to the defendant, which they pinned on their coats in honor of St. Patrick's day. Clark pulled the ribbon off the defendant's coat, at which he was somewhat offended, and after some angry words between them he threw Clark down, and a scuffle ensued between them. Jackson pulled the defendant off Clark, and he attacked Clark again, Jackson again interfering to pull him off.

Clark testified, in substance, that the defendant had him down, and hurt his ear, kicked at him, and kicked him in the stomach, and some words ensued in relation to a claim for rent the defendant asserted. Thereupon Quirk, the deceased, asked the defendant what he was pitching on him (witness) for, and he and Quirk got to scuffling. That Quirk said to

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him: What did he jump on me for? It was not my fault that my folks owed him rent; and that he had no right to pick on me for the rent as long as I did not owe it to him; "and they started to scuffle again." This occurred in the front part of the saloon. "And finally the deceased went back in the saloon to a card table, with Smith, and sat down. The deceased asked the defendant if he wanted to fight witness, and the defendant pulled off his coat, and said to witness, 'Come out in the back yard with me.' The deceased asked witness if he wanted to fight, and I said, 'No, Jack; I am no match for him at all;' and Jack said, 'All right,' and went into the back part of the saloon, with Smith, and sat down at a card table."

Another witness, one Minor, testified that he came into the saloon with one Ross, and the defendant and deceased were scuffling against the west wall, about five or six feet from the front door. Defendant's back was against the wall, and deceased was in front of him, and there were two between them; that he heard defendant say, just as he went in the door, "Hold on, Jack; I don't want to scrap with you," and the deceased (Jack) said, "All right," and then Smith and Jack went back and sat down on a card table. Ross testified, in substance, the same, that when they went into the saloon the defendant and the deceased were scuffling. "There was one blow struck. The deceased struck the defendant a tolerably hard blow in the chest somewhere, and the defendant was hollering something,—that he didn't want to fight with him. The deceased did not say anything. They stopped him, and he went and sat down in the back end of the saloon."

Smith testified that in this struggle the deceased got mad, and struck the defendant in the face, and they had hold of each other, when he and Jackson interfered, and he and Grace advised the deceased not to have any quarrel, and got him to go and sit down. Jackson and Grace, in their testi-

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mony, confirm the statement of the previous witnesses that there had been quite a struggle between the defendant and the deceased before the latter went to the back part of the saloon with Smith, and during which the defendant insisted that he did not want to scrap or fight with him. Ross further testified that when the deceased sat down in the back part of the saloon the defendant came up to the side of the bar, by the cigar case, and was talking to somebody, and "he put his hand in his hip pocket, and took a revolver out, and turned it over in his hands, and then he said, 'The first one that jumps me again will get the contents of this,' and then he put it in his coat pocket; that is all I heard him say."

The witness Minor testified that after the deceased sat down the defendant said, when he took out the revolver: "By God, the next man that jumps me, I'll fix him. I'll put seven holes in him; and it won't be the first, nor the second, nor the third, nor the fourth, nor the fifth;" that he (witness) walked out the door, and stayed there a minute, and then came in. Clark testified that the defendant said, as he took out the pistol: "The next man that jumps me, I will shoot; I would as lief shoot as look at him; that nobody was going to jump him;" and then witness went back in the room, and as he passed the deceased he said to him, "Don't jump *Steve* [defendant]; he has a revolver;" that he did not think the deceased heard him, and he (witness) "passed on out the back door, and in a little while came back again," and spoke to Minor about the way the defendant had used him, and walked in a little further, almost to the end of the counter; that the defendant had come back to the bar, and the deceased (Jack) was sitting with Smith, and the defendant said, "Jack, come up here," and the deceased said to Smith, "I believe that man addressed me." The defendant said, "Jack, what did you jump me for?" and beckoned, as indicated by witness, and

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Jack again said, "I believe that man addressed me." Smith then told him to sit down, and be quiet, and Jack said again, "I believe that man addressed me," and he walked up, and the defendant said to him, "What did you jump on me for?" Then he (Jack) said: "It is against my principles to see a man jump on a boy. You ought to know better. You weigh 180 pounds, and he is only a boy of seventeen. He is no match for you at all." And he said, "No, but I am as heavy as you are," and then they clinched. Jack struck him, and knocked him back by the window, and grabbed at him again. The defendant said, "I don't want to scrap with you; I don't mean you;" and then Grace jumped between them, and held them out, and they scuffled around, when the defendant jerked loose, and ran up with the revolver, and said, "Jack, what did you hit me for?" that just then Mrs. Collins, or her sister, came in the back way, and he heard somebody say, "For God's sake, *Steve*, don't!" that he started to look around, and saw the first shot fired; saw Grace dodge, and he saw who shot, and he then ran out. He testified that when the deceased struck the defendant, *Steve*, by the counter, he did not fall, but staggered, and went back, and deceased went up and grabbed him by the arm, and the defendant said, "I don't mean you; I don't want to scrap with you;" and then Jackson, the bartender, came around, and Grace jumped between them. That he did not think that defendant would shoot. He had his foot out towards deceased, and the latter had hold of the defendant, and was following him up, and the defendant was backing up, and both of them were scuffling to get away from Grace; but whether the defendant jerked away, or Grace let him go, he could not say. That Jack had hold of defendant, and was following him up, and the defendant was backing up, and he said, 'What did you hit me for?" and then he shot, and witness started to run, and as he got down the steps he heard three or four more shots fired. That it was a continuous scuffle from the

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time the deceased struck the defendant at the counter and knocked him back.

The witness Minor gave substantially the same account of the transaction as Clark, and testified that when the defendant said to deceased at the counter, "You and I are about equal," the deceased whirled around, and struck defendant along the side of his face, and he staggered back, grabbed the show case as he went, and deceased followed him, when the defendant stepped up or back in a window like (into a recess, with a bench about twenty-two inches high, and about twenty-seven deep) with his left foot out, and said, "No, no, Jack; I don't mean it that way; I don't want to fight you;" but Jack seemed to be coming at him, and the defendant kicked him with the flat of his foot in the stomach. That Jack grabbed him, and they swung out. Grace ran out, and got in under them, and Jackson got hold in some way, and the four were scuffling around, and got over against the west wall. That it was all done quickly, and when the defendant made a motion as if to shoot, Jack ducked behind Grace, and when he raised up the defendant shot. That he thought Grace was shot, as he ducked down. Soon the defendant fired again, and Jack dropped down, and ran in, and got his hands around defendant's waist, and his head up against his stomach, and pushed him right back. That as they came down the saloon he (witness) had to jump out of the way, and he ran for the door, and just as he was going out he looked back, and saw Jack down right on his face. That when Jack grabbed the defendant around the waist, and had his head up against the defendant's stomach, the latter had the revolver up under him shooting as fast as he could. When witness came back into the saloon, he saw Jack lying on the table. He was just alive; made two or three gasps. He testified that Jack did not have hold of the defendant when he fired the first shot, because he saw the defendant walking around Grace before he shot; but

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this is contrary to the testimony of other witnesses, though apparently corroborated by Clark. Smith testified that when the shot was fired they seemed to have hold of each other, and Grace was between them. The defendant drew the revolver, and held it over Grace's shoulder, and began shooting.

Jackson, the bartender, testified to the striking of the defendant by the deceased at the bar, and that the blow knocked the defendant back about seven feet; that Grace jumped in, and witness jumped over the bar, and caught deceased by the back. That the latter was reaching for the defendant, who was up in the window, and he put out his foot and pushed the deceased back, and that he and Grace managed to get them out of the window, but they still had hold of each other, and swung around to the west wall. That defendant said he did not want to have any trouble, or something of that kind; and the deceased was trying to get at him all the time. The defendant said, "Jack, you struck me," and pulled the gun and shot, but he did not take aim. The pistol was pointed over Grace's shoulder. Grace stepped out, and deceased turned and ducked down, and tried to catch the defendant by the legs, and caught him by the waist, and the defendant shot a second time. He was then bent down and under the deceased. He had hold of deceased, and was shooting and backing up at the same time, and deceased was trying to get a better hold of him. Five shots were fired. After the fourth, the deceased fell to the floor, face down, and the defendant shot at him as he lay. That he did not think he took any aim. If he did, it was awful quick. That he was pointing the revolver towards the deceased. After the last shot, the defendant struck the deceased twice on the back of the head with the butt of the pistol. He further testified that deceased had hold of defendant when the first shot was fired; that he then let go, and grabbed for defendant's legs, and crowded him back,

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and the defendant was trying to crowd deceased back, but the latter was too strong for him, and was pushing him back all the time; that after the first shot the whole affair lasted not more than four or five seconds. The witness Grace testified to the blow at the counter, and that when the first shot was fired he was standing between the parties, trying to keep deceased from the defendant, and had both hands on deceased, who was shoving up defendant, and going for him; that the first shot was fired over the shoulder of the witness; that he then dodged out, and deceased came around him, and caught defendant by the legs, and then witness went out of the door; that the deceased never broke his hold until after the first shot was fired; that there were three or four shots fired in rapid succession as he was going to the door, with practically no interval between them.

The defendant testified, among other things, that he had never had any previous difficulty with the deceased, and had known him since the previous November. Had heard him say he would not be afraid to stand up before John L. Sullivan, if he was a little heavier. Heard him tell Collins that he could not go back to Chicago; that he had mashed a man all to pieces there. That it was about some money he had won of a fellow, and he had jumped him about it, and he struck the fellow, and the fellow got his (Quirk's) little finger in his mouth, and he mashed him while the fellow chewed his finger. He said he thought it would go pretty strong against him; he had got into so much trouble there before; and that his mail was addressed to Curry, so they would not know where he was. That during the altercation with Clark about the ribbon the deceased jumped up, and said: "You God damned big duffer, let that boy alone. Why don't you take somebody of your size?" and "struck me here on the ———. That a second or so after, I took out the revolver, and said that the next man that hit me would get some hot lead;" and that he did this to scare

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him. That he knew the deceased was a better man than he, and was afraid of him. That after deceased struck defendant the first time, he (defendant) said: "Don't hit me, Jack. I don't want any trouble with you;" and repeated it four or five times. The deceased was then back by the stove, and Smith was getting him to put his coat on. That he did not attempt to strike back, for he knew he was not able for him. That the deceased got up, and came to the bar, and struck him the blow on the temple as hard as he could strike. That the blow stunned him, and knocked him back into the window recess. That the defendant put up his foot when he was down in the recess, and said "Jack, keep away from me; I don't want any trouble," and the deceased grabbed him by the coat, with both hands, and pulled him off the window seat, and Grace and Jackson were trying to keep him off. That deceased was mad, and he was stunned and in fear, and was afraid of his pounding and mashing him, and doing him bodily injury. That he was pulling back from deceased, and trying to get away from him, but could not. That he had no intention of resenting his attack if he could have got away from him. That the deceased still held him by the coat, and then defendant drew the revolver, and fired upward beside him (indicating), and into the wall. That he did not intend to hit him, and did not take any aim; he intended to scare him. That then Grace dodged out, and deceased dodged down, and grabbed the defendant around the waist, and he was forcing him back, and then he shot again. The defendant described the situation and the subsequent struggle and shooting substantially as the witness Jackson did, and said the deceased did not let go of him until he had pushed him back against the end of the bar, when the fourth shot was fired, and deceased fell down; and that when he shot him the last time he did not know that deceased was seriously hurt, and, as the crowd had gone, he feared he would get up and pound him. Will-

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iam Collins testified to what deceased had said to him about his Chicago difficulty, substantially as already stated. The evidence tended to show that the parties had drunk to excess during the night, and were under the influence of intoxicants. There was evidence that when the defendant was arrested there was a scar on his left temple, which remained there from ten days to two weeks. It was from a half to three quarters of an inch long, and seemed as if it was cut, not to the bone, but through the skin.

1. The evidence tends to show that in the altercation that took place between the defendant and Clark, and to which the deceased made himself an aggressive party as against the defendant, the latter made no assault or attack upon the deceased, but declared frequently and explicitly that he did not want to "scrap" or fight with the deceased, and this, too, although the defendant suffered from him violence and even blows. After the struggle to which Clark was a party was ended, and after the deceased came from his seat by the card table to the counter where the defendant was standing, and there dealt him a heavy blow on the temple, which knocked him staggering back about seven feet, to the window recess, where the deceased fiercely pursued him, the defendant still protested that he did not mean that he desired to fight, and said: "Jack, what are you picking on me for?" that he did not want to have any trouble, and called out, "Jack, what did you hit me for?" He put up his foot, when in the window recess, and pushed or kicked his assailant back with the bottom of his foot, when the deceased had seized him violently, with the evident intention of dragging him out, and inflicting further violence on him. Had he intended or desired to kill the deceased, he could have shot him at once, and before the struggle, which took place after he was apparently pulled out of the window recess. After this, the struggle became fierce, but ended quickly, with fatal result.

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The evidence also tends to show that the deceased was a formidable and dangerous antagonist, and that the defendant feared him, and wanted to avoid trying conclusions with him, even when he had a loaded revolver in his pocket. Beyond question, after the parties got from the recess in the window, they were greatly excited and in the heat of passion, and the circumstances were such that they might be held to warrant the belief on the part of the defendant that he was then, at least, in peril of great personal injury. The court considered the evidence to be such that it was proper to submit to the jury the question whether the killing of Quirk by the defendant was not justifiable, as committed in the lawful defense of the defendant's person, and gave, at the request of the defendant, appropriate instructions on this subject. The court further charged the jury, at the request of the defendant, and in accordance with R. S., sec. 4351, that "If you believe from the evidence that the defendant unnecessarily killed John Quirk, while resisting an assault by Quirk upon him, with intent to do him great bodily injury, you may find him guilty of manslaughter in the second degree;" but the court, of its own motion, further instructed the jury as follows: "In connection with this instruction, I charge you that if the defendant was not justified by the law of self-defense, as heretofore given you in the instructions asked, and as I shall hereafter give it to you, in shooting and killing Quirk, and the killing of Quirk was, therefore, unnecessary and unlawful; and if you are convinced by the evidence beyond a reasonable doubt that when he shot and killed Quirk he did so pursuant to an *intent then distinctly formed* in his mind to kill Quirk, you cannot lawfully find the defendant guilty of manslaughter in the second degree, for the defendant, in such case, if he killed Quirk from *premeditated design* to kill him, is guilty of murder in the first degree." To this instruction there was an exception. This instruction is, we think, manifestly

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erroneous, and in conflict with the language of the statute itself. It placed the criminality of unnecessarily killing another, either while resisting an attempt by such other person to commit any felony, or to do any unlawful act, upon the same ground as the killing of another when perpetrated from premeditated design to effect the death of the person killed; and wholly failed to distinguish between the *intentional and unnecessary* killing under the circumstances stated in sec. 4351, and a killing when perpetrated by *premeditated design* to effect the death of the person killed, which last is murder in the first degree. It certainly was not the intention of the statute to render one who unnecessarily but intentionally kills his assailant, while resisting an attempt on his part to commit any felony, or to do any unlawful act against him, upon the same basis of criminality, as one who commits murder in the first degree. It is clear that under our statute (R. S. secs. 4351, 4363) "a person may intentionally take the life of another, and be guilty of manslaughter, and of that only." The law was thus expressly stated in *State v. Fee*, 19 Wis. 562–565; R. S. 1858, ch. 164, secs. 13, 21. This point was again expressly ruled in *Clifford v. State*, 58 Wis. 477–491. In that case it was assigned as error that "the court virtually charged that if the killing was *intentional*, no matter what the provocation, . . . the defendant is guilty of murder in the first degree;" but this court said that "the court charged no such law;" that "the learned counsel confounds the *intentional* with the *premeditated design* to effect the death of the person killed, and that they are very far apart; that homicide may be intentional in murder in the second degree, and manslaughter in the *third* degree, but not with a *premeditation* necessary to murder in the first degree. . . . The intentional killing may be even justifiable or excusable, but a killing by premeditated design to effect the death of the person killed is always murder in the first degree." Sec. 4351 deals with

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special cases not within the law of murder in the first degree, and it is impossible to resist the conviction that it includes cases of intentional killing, when such killing is unnecessarily committed "either while resisting an attempt by such other person to commit any felony or to do any other unlawful act." The law, having regard to human infirmity, goes upon the ground that a party thus assailed and circumstanced, from weakness of judgment, fear, or other cause may intentionally and unnecessarily kill his assailant in resisting his attempt to commit any felony, or to do any unlawful act; and the criminality of such killing, by the statute, is therefore reduced to manslaughter in the second degree. This view is not in conflict with anything actually decided in *Hogan v. State*, 36 Wis. 226–244. That case involved only questions concerning the law of murder, but by way of illustration the law of manslaughter in the first, second, and third degrees was referred to. The particular section here in question was not cited, nor was there any question before the court in regard to it, and the language of RYAN, C. J., on page 244, clearly shows that his attention was not directed to sec. 4351, for he says: "The definitions of murder in the third degree and of manslaughter in the first, second, and third degrees use the words 'without design to effect death,' thus positively excluding such a design." This is not true as to manslaughter in the second degree, under R. S. 1858, ch. 164, sec. 13, to which sec. 4351 of our present statutes exactly corresponds, but is true as to manslaughter in that degree under R. S. 1858, ch. 164, sec. 12, to which sec. 4350 of our present statutes exactly corresponds. It is probable that in the passage quoted from *Clifford v. State*, *supra*, Mr. Justice ORTON inadvertently named manslaughter in the *third* degree, when he must have intended manslaughter in the second degree, under sec. 4351. The view we have taken of sec. 4351 is

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sustained by *Giskie v. State*, 71 Wis. 615, and *Doherty v. State*, 84 Wis. 152. The defendant was entitled to have the instruction he had asked under sec. 4351 given to the jury, without the qualification added by the court. This qualification was erroneous, and operated to deprive the defendant of the benefit of the section.

2. The court instructed the jury that if they were not convinced from the evidence, beyond a reasonable doubt, that the defendant was guilty of murder in the first degree, then their verdict must be not guilty, unless they found him guilty of manslaughter in the second degree, under the instruction given them at the request of the defendant's counsel; and the court refused to give the jury instructions specially requested under the statute in relation to manslaughter in the second, third, and fourth degrees, as defined in secs. 4350, 4351, 4354, 4362. The effect of the charge of the court made it necessary for the jury to acquit the defendant, or to convict him of murder in the first degree, or of manslaughter in the second degree, under the instruction asked on that subject by the defendant, and as modified by the court. All other grades or degrees of felonious homicide were withdrawn from the consideration of the jury. We consider that the view thus taken of the legal aspects of the case was too narrow and too much restricted, and that the evidence which we have stated at considerable length would, if believed by the jury, in different aspects, have sustained a verdict finding the defendant guilty of manslaughter in the second, third, or fourth degree, if the defense of justifiable homicide was not substantially made out.

We purposely refrain from commenting upon the evidence, or indicating more exactly what, in our estimation, it tends to prove, not desiring to embarrass a fair consideration of the merits on the second trial. It was the duty of the court to accurately give to the jury the law of whatever degree of felonious homicide the evidence tended to prove, and no

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other. 2 Bish. New Cr. Proc. § 638, and cases in note 4; *Bennett v. State*, 57 Wis. 81. In *Perkins v. State*, 78 Wis. 551, it was said that "The court should be very sure that the evidence could not justify some lower grade of crime before so instructing the jury. The third degree of manslaughter is 'the killing of another in the heat of passion, without a design to effect death, by a dangerous weapon.'" In the present case there was a fierce attack made by the deceased on the defendant, and a desperate struggle ensued, and, as said in *Perkins v. State, supra:* "How can the court say that there was no heat of passion, or that there was a design to effect death by the shooting? He may have designed to shoot, but not to kill,—that is not impossible. These were facts for the jury, not for the court, to find, or to find that they did not exist." What the jury could properly find as proved involved the credibility of witnesses, the consideration of all the facts and circumstances in evidence, and the inferences that might be fairly drawn from them, as well as the question of the defendant's intent, so far as material. In like manner it was for the jury to consider and determine, from the evidence, under appropriate instructions as to what would constitute such offense, whether the case made out was one of manslaughter in the fourth degree. Our conclusion upon the whole case is that in its proper legal aspects it was not correctly and properly submitted to the jury. For these reasons the judgment of the circuit court must be reversed, and a new trial awarded.

By the Court.—The judgment of the circuit court for Iowa county is reversed, and the case is remanded to that court for a new trial, and to that end it is ordered that the warden of the state prison, in whose custody the said accused, *Stephen Terrill*, now is, do deliver him into the custody of the sheriff of the county of Iowa, who is required to keep him in his custody until discharged therefrom according to law.

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MARSHALL, J. I concur in the reversal of the judgment in this case, but dissent from the criticism made of the following language in the learned judge's charge to the jury: "I charge you that, if the defendant was not justified by the law of self-defense as heretofore given you in the instructions asked, and as I shall hereafter give it to you, in shooting and killing Quirk, and the killing of Quirk was, therefore, unnecessary and unlawful, and if you are convinced by the evidence beyond a reasonable doubt that when the defendant shot and killed Quirk he did so pursuant to an intent then distinctly formed in his mind to kill Quirk, you cannot lawfully find the defendant guilty of manslaughter in the second degree, for the defendant in such case, if he killed Quirk from premeditated design to kill him, is guilty of murder in the first degree." If there is any branch of the law where the doctrine of *stare decisis* should be more rigidly maintained than in any other, it is in respect to the criminal law, and particularly in regard to the law of criminal homicide. To carefully and effectually distinguish between the different degrees of felonious homicide is at best not free from difficulty, and certainly such difficulty should not be increased by new distinctions, having the effect to overrule or cast doubt upon the settled law as it has heretofore been understood in this state for a quarter of a century, and in New York, from whence our statutes prescribing the degrees of felonious homicide were adopted. Such, in my judgment, is the effect of the criticism which my brethren make of the charge referred to. Since the exhaustive discussion of this subject in the masterly opinion by RYAN, C. J., in *Hogan v. State*, 36 Wis. 226, the bench and bar of this state have understood that every homicide perpetrated pursuant to a previously formed intent to take human life, and not under such circumstances as to be justifiable or excusable, is murder in the first degree. Such was the decision of this court in that case, so distinctly made as to be unmistakable, and

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it has not since been departed from, so far as I am able to ascertain. "Previously formed intent to kill" and "premeditated design to kill" are synonymous terms. Says the learned chief justice: "We take the 'premeditated design' of our murder in the first degree to be simply an intent to kill. Design means intent, and both words essentially imply premeditation. The premeditation of the statute does not exclude sudden intent, and need not be slow, or last long. This very plainly appears, not only by the force of the words used, but also by the apparent use throughout the definitions of murder and manslaughter, of the terms, 'design' and 'premeditated design,' to effect death, as co-equal terms." To be sure, the learned chief justice speaks of the language of the second as well as of the first and third degrees of manslaughter, as containing the words "without design to effect death," when such words are not there. Such error probably came from the fact that he had before him the uniform construction given to the same statute by the courts of New York to the effect that design or intent to kill must be absent in the second as well as in the first and third degrees of manslaughter. But that the court decided in the *Hogan Case* that the terms "premeditated design to kill" and "previously formed intent to kill" mean one and the same thing, as applied to our statutory murder and manslaughter, is too clear to admit of any discussion whatever. In *Clifford v. State*, 58 Wis. 477, the following instruction was approved: "If you find from all the evidence in this case, beyond all reasonable doubt, that the defendant shot William R. Pugh, thereby causing his death, from a premeditated design to effect his death, then, no matter what the provocation was, or what the surrounding circumstances were, unless such shooting was justifiable, as explained in these instructions, he is guilty of murder in the first degree." To be sure, language is used by Mr. Justice ORTON in the same opinion to the effect that a mere intentional

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killing is not equivalent to the premeditated design of the statute, but that it is not inconsistent at all with the decision in *Hogan v. State* to the effect that a homicide pursuant to an intention distinctly formed in the mind to kill does constitute such equivalent. I am not able to reason sufficiently close to see any distinction between the words, "If you are convinced by the evidence beyond a reasonable doubt that when the defendant shot and killed Quirk he did so pursuant to an intent then distinctly formed in his mind to kill Quirk, you cannot lawfully find the defendant guilty of manslaughter in the second degree, for the defendant in such case, if he killed Quirk from premeditated design to kill him, is guilty of murder in the first degree," and the words approved in *Clifford v. State*. "Premeditated design to kill," as used in the latter, instead of "intention previously distinctly formed in the mind," makes no difference. They mean the same. The intentional killing that may exist, consistent with manslaughter in the second degree, is the intent that springs from momentary impulse, and is implied from the mere act itself, as in *Doherty v. State*, 84 Wis. 152. Such must necessarily have been the design of the law, else a person in any case may deliberately kill another if such killing be done while such other is attempting to commit a felony, or after such attempt shall have failed, and be guilty only of manslaughter in the second degree. This is the first time, in my judgment, that such doctrine has been laid down by this court. The general doctrine is that, where the killing is intentional, that is, where there is a specific intent in the mind to kill which is effected by the act of the slayer pursuant to such intent, and the killing is not lawful, it is murder. 2 Bish. Cr. Law, § 695. In *People v. Lilley*, 43 Mich. 521, the subject of what constitutes the intent, which is the distinguishing characteristic between murder and manslaughter, was considered, and it was there said, in effect, that while manslaughter often involves intent to kill, it is

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not the deliberate intent which constitutes murder in the first degree. When once it appears that the intent to take life existed, speaking, clearly, of intent distinctly formed in the mind, as the learned judge said in this case, and circumstances do not exist to render the killing lawful or excusable, the homicide is murder.

As said before, our statute was adopted from New York. It may be found in 2 R. S. N. Y. 1829, 661, § 11. It had a well-recognized construction there before its adoption here, hence such adoption carried with it such construction. The language of Mr. Justice EMMONS, in *People v. Austin*, 1 Parker, Cr. R. 166, states clearly such construction. We quote from the opinion as follows: "Whether the act was murder or manslaughter under our statute depends entirely upon the existence of an intention to kill. . . . There is only one homicide known to our law which becomes murder in the absence of an intent to effect death, and that is when the act is perpetrated by one then engaged in the commission of a felony. Except in that one case, no homicide is murder without an intention to kill, and with such an intention every homicide, with the single exception already mentioned, unless it be justifiable, is murder. . . . If a homicide be perpetrated without an intention to kill, it would be manslaughter and no more, except in the single case mentioned; but, if perpetrated with an intention to kill, no matter how recent the provocation or how high the passion, it is murder. An act of homicide perpetrated with a premeditated design to effect death, though in the very highest flight of passion and springing even from an existing provocation, can find no resting place in our statute, except under the definition of murder or justifiable homicide, and, the intention to kill being established, there is no degree or description of manslaughter in the statute which can embrace it." To the same effect are *People v. Sherry*, 2 Edm. Sel. Cas. 52; *People v. Pritchard*, 2 Edm. Sel. Cas. 219; and *People v. Beckwith*, 103 N. Y. 360.

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The foregoing sufficiently shows the reasons for my dissent from the criticism made in the opinion of the court to that portion of the judge's charge here discussed. Thus recording such dissent, I leave the subject.

KROUSKOP and others, Appellants, vs. KROUSKOP and others, Respondents.

February 2 — February 23, 1897.

Fraudulent conveyance: Action to set aside: Creditor's suit: Pleading: Trust in land.

1. A complaint, in an action by a mortgagor against his mortgagee to set aside a mortgage given to hinder and delay creditors and a title obtained on foreclosure thereof, is bad on demurrer if it does not show that the execution of such mortgage was procured from the plaintiff by the fraud of the mortgagee. The mortgage may be valid as between the parties, though fraudulent as to creditors.
2. Where the complaint sets forth certain promises by the mortgagee to dispose of the property and pay the debts of the mortgagor as the inducement by which the execution of the mortgage was procured, it is not sufficient to allege the nonperformance of those promises by the mortgagee, since that does not establish a fraudulent intent at the time of making them.
3. Neither the mortgagor nor his creditors can maintain an action to enforce a trust in favor of the creditors growing out of such a transaction, because a trust in land can, under sec. 2302, R. S., be created or proved only by an instrument in writing.
4. The plaintiffs in this case are in no position to maintain the action as a creditor's bill. For that purpose it must appear that they have exhausted their legal remedies,—that their claim has been reduced to judgment and an execution thereon has been returned unsatisfied.

APPEAL from an order of the circuit court for Richland county: GEO. CLEMENTSON, Circuit Judge. *Affirmed.*

The action is by *George Krouskop*, his wife, and three of

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his creditors, against *A. H. Krouskop*, as principal defendant, and several other creditors of *George*, who refused to join as plaintiffs. A demurrer to the complaint, on the ground that it does not state facts sufficient to constitute a cause of action, was sustained. This appeal is from an order sustaining the demurrer.

The complaint is very long. The substance, so far as necessary to show the questions involved, is as follows: The plaintiff *George Krouskop* was engaged in business in Richland Center, for many years. In 1884 he became financially embarrassed, and made an assignment for the benefit of his creditors. Through the assistance of the defendant *A. H. Krouskop*, who became surety for considerable sums which he afterwards paid, he compromised with his creditors and resumed business. Becoming again embarrassed in 1888, with creditors pressing and commencing actions, he gave a mortgage upon all his property, both real and personal, to *A. H. Krouskop*, who was his brother. His property nearly all consisted of real estate, said to be worth $35,000, on which there was a mortgage of $7,000, which he procured to be assigned to himself, and some unpaid taxes, which he paid. There was due to *A. H. Krouskop* $6,500. It is alleged, in effect, that the two *Krouskops* agreed in the opinion that if the property was subjected to the payment of the debts in the usual manner, by execution sales, it would be sacrificed and not pay the debts, while, if that could be prevented, the property might be sold by *A. H. Krouskop*, by proper management, so as to realize enough to pay all the debts and leave a handsome surplus to *George Krouskop*. It is alleged that the purpose of the execution of the mortgage was, in good faith, to make an assignment for the benefit of all the creditors of *George Krouskop*, of all his property, to be sold, handled, and disposed of by *A. H. Krouskop*, and applied by him to that use. It is alleged that *A. H. Krouskop* assured both *George Krouskop* and his wife, "each sepa-

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rately and apart," that he would take title to the property, and apply it faithfully to the payment of all the debts of *George Krouskop*, and return whatever should remain to them. The purpose was kept secret, and not disclosed to creditors. The creditors put their claims in judgments, which became liens upon the lands. The mortgage was afterwards foreclosed, with the consent of *George Krouskop*, for the purpose of cutting off the liens of these judgments, so that the lands might be more easily disposed of, to carry out the original intention of the parties to the mortgage. The lands were bought in at the foreclosure sale, for about half their value, by *A. H. Krouskop*, who now claims to be sole owner, and refuses to carry out the agreement whereby he obtained title. The complaint demands judgment that the transaction be declared a trust for the benefit of the creditors of *George Krouskop;* that *A. H. Krouskop* be required to account, and "to carry out all of the conditions and provisions under which he took the property."

For the appellants there was a brief by *John D. Wilson*, and oral argument by *A. R. Bushnell.*

For the respondents there was a brief by *Miner & Miner*, *F. W. Burnham*, and *W. S. McCorkle*, attorneys, with *R. M. Bashford*, of counsel, and oral argument by *W. S. McCorkle* and *R. M. Bashford.*

NEWMAN, J. It is evident, from the facts alleged in the complaint, that the purpose of the execution of the mortgage from *George Krouskop* and wife to *A. H. Krouskop*, and of the entire transaction by which the title to the lands became vested in him, was to hinder and delay the creditors of *George Krouskop.* As to them, it was fraudulent and void. But that fact does not, of necessity, affect the title of *A. H. Krouskop* with infirmity; for, as between the parties, the transaction may be upheld as valid, notwithstanding its infirmity when assailed by creditors. The parties

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to the transaction are in no way touched by the rule of the maxim, "*In pari delicto potior est conditio defendentis.*" It is not tainted, as to them, by its infirmity towards creditors. As between the parties to the transaction, it may be upheld, rescinded for fraud, or reformed for mistake, according to the right of the case. *Clemens v. Clemens*, 28 Wis. 637; *Dietrich v. Koch*, 35 Wis. 618; *Davy v. Kelley*, 66 Wis. 452.

The complaint fails to show that the execution of the mortgage was procured by the fraud of the principal defendant. There are general averments that he "wickedly contrived," and "designedly and with a fraudulent intent" "requested and enticed," "holding out inducements," and made promises. It is not alleged that the inducements held out were false, nor that the promises were insincere; and no facts are alleged which show that they were so. His failure to perform these promises is not sufficient to establish a fraudulent intent at the time of making them. *Patterson v. Wright*, 64 Wis. 289. So, the complaint fails to state a cause of action in favor of *George Krouskop* and wife for rescission.

If the contract was so executed and evidenced as to be valid in that respect, no doubt it could be enforced against the principal defendant at the instance of the mortgagors. The evident intention of the transaction was to create a trust in favor of the creditors of *George Krouskop*, and a resulting trust in favor of himself and his wife. But such a trust in lands can neither be created nor proved by parol. It can be created and proved only by an instrument in writing. R. S. sec. 2302. A parol trust in land is void, in the election of the *trustee*. The courts will not interfere to compel him to execute it. *Fairchild v. Rasdall*, 9 Wis. 379; *Karr v. Washburn*, 56 Wis. 303; *Main v. Bosworth*, 77 Wis. 660; *Begole v. Hazzard*, 81 Wis. 274. There are no words in the complaint which seem to import a written instrument declaring the trust, nor that any agreement was made other than that to be implied from the principal defendant's oral

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promises. The allegation that *A. H. Krouskop* "assured *George Krouskop* and *Elizabeth Krouskop*, each separately and apart," that he would assume such a trust, seems most naturally to import that the promises relied upon were made by parol only. In fact, it was not claimed otherwise on the argument. For this reason, the trust cannot be enforced at the instance of *George Krouskop*.

The objection to its enforcement at the instance of the creditors of *George Krouskop* is insuperable, for the same reason. It does not relieve the situation to say that the transaction was an assignment for the benefit of creditors, and that such assignments, if voidable for any reason, are still valid, in the election of creditors. The difficulty is deeper than that. This transaction, even if intended to be an assignment for the benefit of creditors, is void at the election of the *assignee*, and will not be enforced against him, because of the statute which requires the interest of the creditors in the lands to be declared by some writing.

It is claimed that parol evidence is competent to show that this transaction was intended to be an assignment for the benefit of creditors; and *Winner v. Hoyt*, 66 Wis. 227, is cited to show that it is competent to show, by parol evidence, facts and circumstances which illustrate the intention of the parties. That is familiar, but not relevant. In that case the evidence was received for the purpose of showing that the instrument was intended to be an assignment for creditors, and void for an illegal preference. Fraud may always be proved by parol evidence. It can seldom be proved by any other. Here, parol evidence is sought to be introduced to prove the making of an agreement which the statute says can only be made in writing. It cannot be said that there is any such agreement, unless it has been evidenced by writing. *Fairchild v. Rasdall*, *supra*. And the plaintiffs are in no position to enable them to maintain the action as a creditors' bill. In order to maintain such an ac-

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tion, it must appear that they have exhausted their legal remedies without avail. It must appear that the claim has been reduced to judgment, not only, but that an execution on the judgment has been returned unsatisfied, at least in part, or that the action is brought in aid of an existing execution levy. *Ahlhauser v. Doud*, 74 Wis. 400; *Daskam v. Neff*, 79 Wis. 161; *Gilbert v. Stockman*, 81 Wis. 602; *Rozek v. Redzinski*, 87 Wis. 525; *Northwestern Iron Co. v. Central Trust Co.* 90 Wis. 570. The complaint does not show that an execution has been issued. The complaint does not state a cause of action in favor of any of the plaintiffs.

By the Court.— The order of the circuit court is affirmed, and the cause remanded for further proceedings according to law.

KOOP, Appellant, vs. BURRIS and others, Respondents.

February 2 — February 23, 1897.

Foreclosure: Setting aside sale.

Where it appeared, on a motion to set aside a sale on foreclosure, that intending bidders had been misled to the prejudice of the defendants by statements of the sheriff prior to the sale, and led to believe that successful bidders would not be required to make immediate full payment in cash, and that upon a resale the premises would bring a larger sum than the amount due on the judgment, *held*, that it was not an abuse of discretion to set aside the order confirming the sale, and to order a resale, on a sufficient bond being given to secure responsible bidding of such higher price.

APPEAL from an order of the circuit court for La Fayette county: GEO. CLEMENTSON, Circuit Judge. *Affirmed.*

On the 30th day of January, 1895, a judgment of foreclosure and sale was entered in the usual form. Such proceedings were thereafter had that the mortgaged premises were duly advertised for sale on the 2d day of April, 1896. The

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amount then due was about $29,438. The premises consisted of about 900 acres of valuable lands, on which were several dwelling houses and other buildings. Such lands included the homestead of one of the defendants. At the sale, the lands were first offered in parcels, and, no bids being received, the same were then offered as a whole, and sold to the plaintiff for $29,595.80, which was $890.03 less than the amount required to satisfy the judgment and costs of sale.

On the 14th day of April, 1896, on due notice, a motion on the part of plaintiff was made to confirm the sale. At the same time, on like notice, a motion on the part of defendants was made to set the sale aside and order a resale, based on affidavits tending to show that, previous to the sale, the sheriff stated to persons who purposed being present as bidders that they would not be required to make their bids good by an immediate payment in cash in case of becoming purchasers, but would only be required to pay a sufficient amount to show their good faith, and would then be allowed a reasonable length of time to produce the balance; that, relying on such statement, interested parties, to whom knowledge of such statements came, prepared and caused to be printed and circulated a handbill giving information to that effect to the public generally; that, relying upon such information, a number of responsible persons attended at the sale, each prepared with an ample supply of money to pay down as an earnest of the genuineness of his bid; that, immediately after the sale was called, plaintiff's attorneys, by the consent of the sheriff, publicly announced that all bidders would be required to make immediate payment in full in cash in case of a purchase, whereupon the proposed bidders and defendants, by their attorneys, protested against such requirement, and requested a postponement of the sale for a reasonable length of time to enable bidders to be present prepared to comply with such requirement; that such

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protest and request for adjournment were supported by a statement of the facts heretofore referred to, as having been the cause of bidders being misled respecting the manner in which the sale would be conducted; that the sheriff, under the influence of and by the direction of plaintiff's attorneys, disregarded such protest and request, and proceeded with the sale, resulting as before stated; that by reason of the request for immediate payment in full, contrary to the previous understanding of the bidders, there was no bid except that of plaintiff, when, if such understanding had been carried out, the property could have been sold for in the neighborhood of $33,000; that in case of a resale the affiants would be prepared to purchase the property for a sum in excess of the whole amount due plaintiff.

Affidavits were made on the part of plaintiff, tending to show that the only statements made by the sheriff previous to the sale were to the effect that it was the custom at such sales to require bidders to pay down only a reasonable sum sufficient to show their good faith, and to allow them a reasonable length of time to produce the balance; that the sheriff did not make any positive promise that such custom would be followed at the sale in question.

When such two motions were called up for a hearing, defendants' counsel moved for a continuance of the hearing, for the purpose of enabling the defendants to furnish a sufficient bond to insure responsible bidding in case of a resale, in accordance with the affidavits presented by defendants. Such motion to continue was denied. The motions were then heard, with the result that plaintiff's motion was granted, and defendants' denied. The trial judge stated at the time, however, after announcing his decision, that on presentation of a sufficient bond, during the term, to secure responsible bidding at a resale, to the amount suggested in the defendants' affidavits, the order confirming the sale would be set aside, and a new one ordered. Thereafter,

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during such term, defendants, by their attorneys, did produce in court a bond in the sum of $50,000, satisfactory in all respects to the trial judge, to insure that, in case of a resale, the property would bring not less than $33,300; and thereupon the court, on a motion which was heard on the affidavits heretofore mentioned and one additional affidavit by the sheriff corroborating plaintiff's previous affidavits, made an order setting the confirmation aside, vacating the sale, and ordering a resale, to which order plaintiff's counsel excepted, and from which this appeal was taken.

For the appellant there was a brief by *Orton & Osborn*, and oral argument by *P. A. Orton*. They argued, *inter alia*, that under the judgment the sheriff had no right to sell except for cash down, and that he had not in fact made any statement to proposing purchasers that he would do otherwise. *Hill v. Hoover*, 5 Wis. 354; *Babcock v. Perry*, 8 id. 277; *Adams v. Haskell*, 10 id. 123; *Sauer v. Steinbauer*, 14 id. 70. Courts of equity will not set aside sales except in special cases. Here was no fraud, collusion, or misconduct. Inadequacy of price is not sufficient. *Kneeland v. Smith*, 13 Wis. 591; *Allis v. Sabin*, 17 id. 626; *Meehan v. Blodgett*, 86 id. 511.

For the respondents there was a brief by *Wilson & Martin* and *D. J. Gardner*, and oral argument by *H. C. Martin* and *D. J. Gardner*.

MARSHALL, J. This appeal challenges a decision respecting a matter which was addressed to the judicial discretion of the trial court. It therefore cannot be disturbed, unless it appears clearly that such discretion was abused. The law applicable to such cases has been so often stated, and was so recently discussed in *Homestead Land Co. v. Joseph Schlitz Brewing Co.* 94 Wis. 600, that a rediscussion of the subject at this time would not serve any valuable purpose. The rule that a judicial sale should not be set aside for mere

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inadequacy of price hardly applies in this case, for the trial judge had before him facts tending strongly to prove that persons who desired to purchase at the sale were misled, to defendants' prejudice, by statements made by the sheriff prior to such sale respecting whether successful bidders would be required to make immediate full payment in cash, and that, by a resale, the injury thereby done would be remedied, without any prejudice to plaintiff respecting the recovery of the amount due on the foreclosure judgment. Such being the case, we cannot say it was an abuse of discretion to make the order appealed from.

By the Court.— Order affirmed.

DE WITT, Respondent, vs. THE HOME FORUM BENEFIT ORDER, Appellant.

February 2 — February 23, 1897.

Life insurance: Benefit society: Waiver.

A benefit society, by receiving into membership a person who had previously been grossly intemperate and who had taken the Keeley treatment for the cure of the liquor habit, with knowledge on the part of the person who took his application at the time thereof that he had taken such treatment, thereby waives the conditions in the application in respect to the use of intoxicating liquors, so far as such use was implied in the taking of such treatment; and in this case evidence that such officer had knowledge of the facts was properly admitted.

APPEAL from a judgment of the circuit court for Grant county: GEO. CLEMENTSON, Circuit Judge. *Affirmed.*

The case is fully stated in the opinion.

For the appellant there was a brief by *Bushnell, Watkins & Moses*, and oral argument by *A. R. Bushnell* and *A. A. Watkins*. They contended that the falseness of the applicant's statements as to his temperate habits avoided the

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contract. *Baumgart v. Modern Woodmen*, 85 Wis. 546; *Blumer v. Phœnix Ins. Co.* 45 id. 622; *S. C.* 48 id. 535; Cooke, Life Ins. §§ 15–17. The policy was absolutely conditioned on the truth of those statements, and the evidence as to the knowledge of the person procuring the application was wrongly admitted, as tending to vary the contract by parol. *Kenyon v. Knights Templars & M. M. A. Asso.* 122 N. Y. 247–257; *Barteau v. Phœnix Mut. L. Ins. Co.* 67 id. 595; *Foot v. Ætna L. Ins. Co.* 61 id. 571–576; *Vose v. Eagle L. & H. Ins. Co.* 6 Cush. 42–49; *Galbraith v. Arlington Mut. L. Ins. Co.* 12 Bush, 29; *Westropp v. Bruce*, Batty, 155.

For the respondent there was a brief by *W. E. Howe* and *Paul Meyer*, and oral argument by *W. E. Howe*.

CASSODAY, C. J. This action is brought to recover $3,000 and interest, according to the terms of a certificate delivered by the defendant March 3, 1893, upon the life of Charles A. De Witt, who died March 16, 1894. The defense is to the effect that, contrary to the conditions contained in the application for such insurance, said De Witt was addicted to the habitual use of intoxicating liquors; that while under the influence of intoxicating liquors, and while intoxicated, he took his own life; that said De Witt falsely and fraudulently represented to the defendant, for the purpose of obtaining from it said certificate, that he had never had delirium tremens, that he did not use any malt or spirituous beverages, and had never used the same, except occasionally, and that he had never theretofore been other than a sober and temperate man. The medical examiner's answers to questions relating to such matters were to the effect that De Witt did not then use any malt or spirituous beverages; that he had used them occasionally; that he had no reason to suppose that De Witt was then or had been other than a sober and temperate man, except as above stated; and that he considered De Witt a first-class risk.

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At the close of the trial, the jury returned a special verdict to the effect that the defendant's grand secretary, who took the application of De Witt for membership in said order, knew, before De Witt was received into membership, that he had taken the Keeley treatment for the liquor habit; that such answer of the medical examiner as to De Witt's use of malt or spirituous beverages was a full, complete, and true answer; that, at the time said De Witt made such application, he did not use malt or spirituous beverages; that De Witt died in consequence of and as a direct result of the disease pneumonia; that said De Witt did not destroy his own life; that his death was not the direct result or consequence of wounds self-inflicted; that De Witt did not die in consequence of and as a direct result of the use of intoxicating liquors. From the judgment entered thereon in favor of the plaintiff for $3,277 damages, and $255.31 costs, the defendant brings this appeal.

The evidence sustains the several findings of the jury. True, at the foot of such medical examiner's statement is the following warranty: "I do hereby warrant that the answers as written to the above questions put by the medical examiner are full, complete, and true, and the same shall be made a part of the herein referred to application for membership, and that I am the person who signed the application on the opposite side, and was examined as above. Charles A. De Witt, Applicant." Nevertheless, the fact found by the jury to the effect that the defendant's grand secretary, who took the application for membership, knew, before De Witt was received into membership, that he had taken the Keeley treatment for the liquor habit, was, under the repeated rulings of this court, a waiver of the conditions contained in the application, so far as such use of liquor was implied in the taking of such treatment. *Renier v. Dwelling House Ins. Co.* 74 Wis. 89, and cases there cited; *Stanhilber v. Mut. M. Ins. Co.* 76 Wis. 285; *Bourgeois v.*

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Mut. F. Ins. Co. 86 Wis. 402; *Dick v. Equitable F. & M. Ins. Co.* 92 Wis. 46; *Dowling v. Lancashire Ins. Co.* 92 Wis. 63; *Goss v. Agricultural Ins. Co.* 92 Wis. 233. It necessarily follows that there was no error in admitting evidence to prove that the person who, on behalf of the defendant, took such application, had such knowledge. We are constrained to hold that the court submitted to the jury all the material and controverted questions of fact involved in the case. The application for a continuance, under the circumstances disclosed, was insufficient and properly denied.

By the Court.— The judgment of the circuit court is affirmed.

McMahon, Appellant, vs. Ida Mining Company, Respondent.

February 3—February 23, 1897.

Master and servant: Negligence.

The "shift boss" in a mine, whose business it is to direct miners where to work, in performing that duty acts in the capacity of master or vice-principal, and if such boss knows of a concealed danger, such as an unexploded blast, at the place where he sets a miner at work, of the existence of which the latter is ignorant and unable with ordinary care to ascertain, and does not inform him thereof, the master is liable for an injury to such miner caused thereby.

Appeal from a judgment of the circuit court for La Fayette county: Geo. Clementson, Circuit Judge. *Reversed.*

This is an action to recover for personal injuries received by the plaintiff while at work as a miner in the defendant's lead and zinc mine, by the discharge of a dynamite blast under circumstances which, it is alleged, established actionable negligence on the part of the defendant. The gist of the complaint is that the plaintiff was set to work by a shift boss in a certain part of the mine where there were con-

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cealed unexploded blasts known to the shift boss, but not to the plaintiff; and that plaintiff, in ignorance of the danger, while drilling and preparing for a blast, was injured by the explosion of one of the concealed blasts. The facts appearing by the plaintiff's evidence were substantially as follows: The defendant's mine is about 100 feet below the surface of the ground, in solid rock, the mining being carried on in drifts of varying width and height. Holes were drilled in the forehead of the drift by steam power. These holes were then charged with dynamite, which was exploded by electricity, several such blasts being frequently discharged simultaneously. These holes were sometimes drilled so deep that the explosive power of the dynamite was insufficient to rend the rock and the force of the explosion was not observable at the mouth of the hole. Such holes in which a blast had been fired, but had not apparently rent the rock, were called "butts" or the "butt end" of a hole. The plaintiff was an experienced miner, and had worked for defendant about a month prior to the accident in question.

The evidence showed that one Thomas Cadden was also in the employ of the company at the time of the accident, and was what was termed a "shift boss." The duties of the shift boss appear to be to direct the men in the mine where to work. The shift boss was called as a witness, and testified that on the 1st of July, 1894, he loaded six holes in the forehead of a certain drift with dynamite, and endeavored to explode the same by electricity; that there were three holes that had wires sticking out of them after the blasts had been fired, and that this was evidence that the charges in the holes had not exploded. The evidence further showed that no further work was done at this place in the mine until the 17th day of July following, at which time the shift boss placed the plaintiff and one Hugh Cadden at work at the forehead in question. The plaintiff

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testified that he did not hear the shift boss say anything about unexploded blasts, but his fellow laborer says that the shift boss said that there were two unexploded blasts there, and that they must look out for them. The two workmen found two holes, which had wires sticking out of them, and concluded that they were the unexploded blasts, and they carefully scraped up the tamping, put in some additional dynamite, and fired them. The testimony tends to show that no other holes in that vicinity had wires sticking out of them. After firing these two blasts, the plaintiff and his fellow workman quit work for the day, and returned on the following day to the same place. There were several butts of holes in the forehead in the immediate vicinity, and the evidence tends to show that there was no way of distinguishing a butt of a hole (that is, a hole in which a blast had been fired without apparent result) from a hole in which no blast had been fired. The plaintiff and his fellow workman, finding a hole without any wires sticking out of it, concluded that it had been fired unsuccessfully, and proceeded to scrape out the contents of it so far as possible, and, finding it in the proper place for a blast, started to drill it deeper. This hole was in fact the hole containing the unexploded blast. After drilling for a time the dynamite in the hole exploded, seriously injuring plaintiff. Upon these facts the plaintiff was nonsuited, and appealed.

For the appellant there was a brief by *Orton & Osborn* and *J. B. Simpson*, and oral argument by *P. A. Orton*.

For the respondent there was a brief by *Spensley & McIlhon* and *Aldro Jenks*, and oral argument by *Calvert Spensley* and *Mr. Jenks*. They contended that the duty of the "shift boss" did not involve any contract obligation of the master, but he was a mere fellow-servant of the miner. *Dwyer v. Am. Exp. Co.* 82 Wis. 307–310; *Stutz v. Armour*, 84 id. 623; *Crispin v. Babbitt*, 81 N. Y. 516; *Mancuso v.*

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Cataract Const. Co. 87 Hun, 519; *Flynn v. Salem*, 134 Mass. 351; *Loughlin v. State*, 105 N. Y. 159, 163; *Hussey v. Coger*, 112 id. 618.

WINSLOW, J. The nonsuit is attempted to be justified on the ground that the shift boss was a co-employee, and that thus the plaintiff's injury resulted from the negligence of a co-employee. There is little or no dispute as to the principles of law on the subject, but the difficulty is in the application of the law. In *Cadden v. Am. Steel Barge Co.* 88 Wis. 409, it is correctly said: "In *Dwyer v. Am. Exp. Co.* 82 Wis. 307, it was held that the question whether different employees of the same master are to be regarded as fellow-servants in a common employment depends upon the nature of the act in the performance of which the injury was inflicted, without regard to the rank of the negligent servant, and that the master is not liable unless the negligent act pertained to a matter in respect to which he owed a direct duty to the servant injured." So the question here is simply whether the shift boss, Cadden, in sending the plaintiff to work in a new part of the mine, where there was a concealed danger of which he (the shift boss) knew, but the plaintiff did not, was performing a duty of the master. A master is bound to furnish the servant a reasonably safe place in which to work, considering the nature of the work. He is not to set a man at work among latent and extraordinary dangers, of which the employee knows nothing, and which he cannot ascertain by experience or observation. In taking the plaintiff from one part of the mine in which he had been at work and setting him at work in a different place, the shift boss was plainly and palpably acting in the capacity of master. The evidence tends to show that he knew of a concealed and terrible danger in the place, of which he did not inform the plaintiff, and that the plaintiff could not, in the exercise of ordinary care, ascertain the existence of that

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danger. We entertain no doubt of the sufficiency of this evidence to take the case to the jury. Further evidence may perhaps show that the risk was a common and ordinary one in a mine of this character, and so was assumed by the plaintiff, or that the plaintiff should have known from the appearance of the hole that it contained the unexploded blast, but neither of these facts now appears so clearly that the court is justified in taking the case from the jury.

By the Court.— Judgment reversed, and action remanded for a new trial.

BOYLE and others, Appellants, vs. NORTHWESTERN MUTUAL RELIEF ASSOCIATION, Respondent.

February 3 — February 23, 1897.

Benefit society: Life insurance: Warranty: Privileged communications.

1. Where an applicant for membership in a benefit society in terms "covenants and warrants" that her answers to questions in her application are full, complete, and true, and that the truth of such application shall be the basis of her rights of membership, and upon the certificate there is an indorsement that it is "issued on the faith that the application made is complete and true and contains all her answers and statements, otherwise this certificate shall be void," the answers in such application are all warranties, and a false affirmative answer to the question "Are you now in sound health?" renders the certificate of insurance void, even though the assured believed when she made it that it was true.
2. Information acquired by a physician or surgeon in attending upon a patient in his professional capacity, and necessary to enable him to treat such patient, is privileged. The object of the provision of sec. 4075, R. S., that no physician or surgeon shall be *compelled* to disclose such information, was to protect the patient, and, construing that section according to its spirit and intention, a physician can neither be *compelled* nor *allowed* to disclose such information in court without the consent of the patient. NEWMAN, J., dissents.

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Boyle and others vs. Northwestern Mutual Relief Association.

APPEAL from a judgment of the circuit court for La Fayette county: GEO. CLEMENTSON, Circuit Judge. *Reversed.*

This action was brought on a certificate of membership issued by the defendant to Bridget Boyle, April 16, 1892, for the benefit of the plaintiffs, in the sum of $1,000, on her application dated April 1, 1892. The assured died on the 27th of April, 1892. The complaint contained the usual allegations that the plaintiffs had presented proofs of such death and offered to surrender said policy, and that the assessment had been made and collected by the defendant to pay said loss, and that in consequence thereof the defendant was indebted to them in the sum of $1,000, for which they demanded judgment. The defendant, among other things, alleged in defense that in the application of the assured she was asked and answered the following questions, namely: "Q. Have you received medical treatment or consulted a physician in the past ten years? A. Yes. Q. And if so, in what years? A. In the year 1890. Q. What were the nature and facts of the sickness or disability? A. Change of life. Q. How long were you under medical treatment? A. Two months. Q. 16. Are you now *in sound health?* A. *Yes.*" That in and by the terms of said application and contract she had covenanted, agreed, and warranted that said answers were true, and particularly that she was on the 1st day of April, 1892, in sound health, whereas said covenants and warranties were false and untrue, and she was not then in sound health, as she well knew, and for other and different causes than "change of life;" that she was then suffering from *endocervicitis*, or inflammation of the uterus, and also from ulcers, abscesses, and inflammation of the fallopian tubes. At the trial the court ruled that the affirmative of the issue was on the defendant, and it produced in evidence the testimony of four physicians authorized to practice, and who had treated and prescribed for Mrs. Boyle, to prove the defense relied on, by information

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they had received from her, and knowledge which they had severally acquired when they treated her as a patient, and for the purpose of enabling them to prescribe for her as such patient. The testimony of each of said physicians was objected to, in due season, on the ground that the information and knowledge thus acquired was privileged, and that they ought not to be allowed to disclose the same. The court overruled such objections and admitted the evidence, and the evidence tended to show that Mrs. Boyle was not, at the time she signed said application, in sound health. The testimony of one of said physicians was to the effect that he treated her in April, 1892, but had prescribed for her prior to that time in 1890 and 1891; that he made an examination of the assured on the 19th day of April, 1892, and found that she had a catarrhal difficulty of the uterus, and inflammation of the fallopian tubes, of a chronic and inflammatory character, and one of the tubes was stopped,— was sealed up at both ends; that he told her she was in a dangerous condition, and it might be necessary for an operation to save her, and she ought to be treated right along, and be very careful with herself; that he gave her medicine, and had never seen her since; that her difficulty was certainly of a chronic character, and it, in his judgment, had existed at least a year. The testimony tended to show that the disease was known as *endocervicitis*. The questions and answers in part first of the application for membership were, among others, as follows: "(15) Have you received medical treatment or consulted a physician in the past ten years? A. Yes. Q. If so, in what years? A. 1890. Q. What were the nature and facts of the sickness or disability? A. Change of life. Q. How long were you under medical treatment? A. Two months. (16) Are you now in sound health? A. Yes. I hereby certify that the foregoing answers and statements are written as made and understood by me. Dated April 1, 1892. Bridget Boyle." Also the following answers to ques-

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tions put by the medical examiner in part second of the application: "(48) Are you now free from disease, nervous or muscular weakness? A. Yes. (49) When did you last consult a physician, and for what reason? A. About two years ago, 'change of life.'" At the foot of this examination is the following, signed by the insured: "I hereby covenant and warrant all the foregoing answers and statements, including those in part first, to be full, complete, and true, and that this written application, and the truth thereof, shall be the basis of my rights for membership in the *Northwestern Mutual Relief Association.* Also, that my certificate of membership shall be in the form prescribed, and shall contain the usual conditions and rules and regulations." Also, in the additional examination for females, the question, among others, "Have you ever had any disease of the breast, or any uterine disease or weakness," which was answered in the negative, and at the foot of such examination was the following: "I hereby declare that the above written answers are true, and agree that they shall be a part of the application, which is the basis of the contract for membership in the *Northwestern Mutual Relief Association.* Bridget Boyle." The conditions on the back of the policy relied on, among others, were as follows: "First. That this certificate is issued and delivered in consideration and on the faith that the application made by the within-named member is complete and true, and contains all his answers and statements; otherwise this certificate shall be null and void."

The case was submitted to the jury to find a special verdict, and answer the following questions, among others: "(1) Did Bridget Boyle, who was insured in the defendant company by policy No. 12,720, believe herself to be in sound health and free from disease on April 1, 1892, at the time she made and signed the application for said policy? A. Yes. (2) Was she in sound health and free from disease at that time? A. No. (4) Did she know when she made

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said application, or did she then have reason to believe, that she had any uterine disease or weakness, except such troubles as usually attend the 'change of life' in women, and which might be reasonably understood to be included in the term 'change of life'? A. No." The plaintiffs moved the court for judgment on the verdict, against the defendant, for $1,000 and costs, but the court denied the motion; and they also moved the court to set aside the verdict, and for a new trial, on the ground, among others, of the admission of improper evidence at the trial, and because the answer to the second question was not sustained by the evidence, and that there was not sufficient evidence to sustain the verdict. The court denied said motion, and entered judgment on the verdict, for the defendant, from which the plaintiffs appealed.

For the appellants there was a brief by *Calvert Spensley* and *Orton & Osborn*, and oral argument by *P. A. Orton* and *Mr. Spensley*. They argued, *inter alia*, that if there was a forfeiture the defendant had waived it by receiving and retaining the premium after knowledge of the falsity of the representation of the assured as to her health. *Erdman v. Mut. Ins. Co.* 44 Wis. 376; *Stylow v. Wis. O. F. M. L. Ins. Co.* 69 id. 224; *Ins. Co. v. Norton*, 96 U. S. 234. The term "good health," as used in the application and answer, means "apparent good health," and does not exclude the existence of latent, unknown defects. *Goucher v. N. W. Traveling Men's Asso.* 20 Fed. Rep. 596; *Conover v. Phœnix Ins. Co.* 3 Dillon, 226; May, Ins. § 295; *Grattan v. Metropolitan L. Ins. Co.* 92 N. Y. 276, 280; *Moulor v. Am. L. Ins. Co.* 111 U. S. 335, 343.

For the respondent there was a brief by *Wilson & Martin*, attorneys, and *F. E. Parkinson* and *B. W. Jones*, of counsel, and oral argument by *Mr. Jones*.

PINNEY, J. 1. The deceased, in her application for membership, in answer to the question, "Are you now in sound

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health?" answered "Yes," and by the terms of her application she "covenanted and warranted all the foregoing answers and statements," including the one in question, "to be full, complete, and true, and that this written application, and the truth thereof, shall be the basis of my rights of membership" in the defendant association; and on her certificate the condition was indorsed, that it was "issued and delivered in consideration and on the faith that the application" made by her "is complete and true, and contains all her answers and statements; *otherwise this certificate shall be void.*" The jury found that the assured, Bridget Boyle, believed herself to be in sound health and free from disease at the time she made and signed her application, and that at that time she was not in sound health and free from disease. We think that the statement in her application and the condition indorsed on her certificate constitute a warranty that Mrs. Boyle was at the time in sound health, and was made by the parties the basis of her rights of membership; that it was a condition of the contract, and, if untrue, that her certificate is null and void. Whether she was in sound health was a matter not presumptively, at least, within the knowledge of the defendant; and it had a right to require, as a condition of Mrs. Boyle's membership, that she should, by express warranty, take all risk as to whether she was then in sound health. We have here, then, a warranty, as distinguished from a representation; and a substantial breach of the warranty, whether affirmative of some existing fact, or promissory, material to the risk, will defeat the policy.

The distinction between a warranty and a representation is familiar, and is stated in *Blumer v. Phœnix Ins. Co.* 45 Wis. 622; *Baumgart v. Modern Woodmen*, 85 Wis. 546. A warranty, it is held, "need not be material to the risk, for, whether material or not, its falsity or untruthfulness will bar the assured of any recovery on the contract, because the warranty itself is an implied stipulation that the thing war-

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ranted is material." Beach, Ins. § 459, and cases cited in note; *Jeffries v. Life Ins. Co.* 22 Wall. 54–56; *Dwight v. Germania L. Ins. Co.* 103 N. Y. 341. It is not important that the party making the warranty really believes in its entire truth; if it be false, it avoids the contract. *Clemans v. Supreme Assembly R. S. G. F.* 131 N. Y. 485. "Sound health," as used with reference to an application for life insurance, has been defined to mean a state of health free from any disease or ailment that affects the general soundness and healthfulness of the system seriously. The word "serious" is not generally used to signify dangerous, but rather to define a grave, important, or weighty trouble. May, Ins. § 295; *Brown v. Metropolitan L. Ins. Co.* 65 Mich. 306. The present case is not really distinguishable from *Baumgart v. Modern Woodmen*, *supra*, where a stipulation in an application for membership in a benefit society, stating that the applicant had never had a certain disease, was held to be a warranty, and that, as it was shown that he in fact had such disease, it was held to be a breach of the warranty, although he never knew it and his death resulted from other causes. The plaintiffs' counsel relied upon the case of *Knights of Pythias v. Rosenfeld*, 92 Tenn. 508, where the language used in the contract was regarded as a representation, and not a warranty, and such was the case of *Illinois Masons' B. Soc. v. Winthrop*, 85 Ill. 537. The case of *Plumb v. Penn Mut. L. Ins. Co.* (Mich.), 65 N. W. Rep. 611, was where the statement that the applicant was "of sound health" was considered a warranty, and it was held that it was a question for the jury whether the insured was in good health when the policy was delivered. The case of *Moulor v. Am. L. Ins. Co.* 111 U. S. 335, is distinguishable from the present case, and was decided on the ground that where the policy in question had been so framed as to leave room for construction, rendering it doubtful whether the parties intended the exact truth of the applicant's statements to be

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a condition precedent to any binding contract, the court should lean against that construction which imposed upon the assured the obligations of a warranty, and that, in the absence of explicit stipulations requiring such an interpretation, it should not be inferred that the assured took the policy with the understanding that it should be void if at any time in the past he was, whether conscious of the fact or not, afflicted with the diseases, or any one of them, specified in the questions propounded by the company, and that such a construction of the contract should be avoided, unless clearly demanded by the established rules governing the interpretation of written instruments. That case does not hold that where, as in this case, a clear and explicit representation of then existing good health was made, the parties may not contract upon the faith of it, and make the truth of the statements a condition of the validity of the certificate, so that that question shall be at the risk of the assured. This we hold the parties did in this case, and their right to make such a contract cannot be denied. *Jeffries v. Life Ins. Co.* 22 Wall. 47; *Ætna L. Ins. Co. v. France*, 91 U. S. 510. In this case the statement in the application and in the certificate or policy, as will be seen, stated an express warranty. The evidence is quite sufficient to support the findings, and to warrant a verdict that Mrs. Boyle had a serious disease at the time she made her application, that had been of a chronic character for a year, though, as it is found, she was not conscious of the fact. For these reasons, therefore, judgment was rightly given in favor of the defendant, unless the evidence of the medical witnesses was improperly received.

2. The question as to the admissibility of the evidence of the physicians, against the objection of the beneficiaries of the certificate, claiming under Mrs. Boyle, the deceased, is not one free from difficulty. There can be no question but that the information they severally acquired, and which en-

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abled them to give their testimony, was acquired in attending Mrs. Boyle as a patient, and that it was necessary to enable them to advise her and to prescribe for her as physicians. Was this information privileged, as to her, under R. S. sec. 4075, which provides that "no person duly authorized to practice physic or surgery shall be *compelled* to disclose any information which he may have acquired in attending any patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon"? By the common law, information thus obtained by a physician or surgeon was not privileged, but he was at liberty to disclose it, either in or out of court, whatever effect such disclosure would have upon the rights, reputation, or feelings of his patient. The contention in favor of the admissibility of the evidence is that the use of the word "compelled" in the section shows that the information thus acquired is not privileged from disclosure as to the patient, whom such a disclosure may most seriously affect, but is privileged only as to the physician or surgeon, and that he may, at his option, disclose it in court, when all the injurious details may be publicly elicited under oath, or he may refuse to do so, in which event only the information is to be privileged, so that its disclosure will not be "compelled." It is argued that this conclusion is strongly supported by secs. 4074 and 4076, in relation to a confession made to a clergyman or other minister, or in respect to communications made by a client to an attorney or counselor at law, or his advice given thereon, in the course of his professional employment. In the above cases the provision is that the clergyman, etc., or the attorney "shall not be *allowed* to disclose" such confession, communication, etc., not that either "shall not be *compelled* to disclose," etc.

Statutory provisions on the subject of privileged information thus acquired exist in very many, if not a majority, of

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the states; but they are all, as far as we have been able to discover, to the effect that the person acquiring the information "shall not be *allowed* to disclose" it as a witness, with the exception of the provision in respect to physicians and surgeons in this state, which was adopted in the territorial statute of 1839 (page 249, § 71), and has been in force ever since (R. S. 1849, ch. 98, § 75; R. S. 1858, ch. 137, sec. 80). The statute of Arkansas, enacted about a year prior to the territorial statute of 1839, from which it may have been borrowed, is in substance in the same terms. It was somewhat considered in *Collins v. Mack*, 31 Ark. 685, but the decision has no decisive bearing. There was no provision in the statutes of 1839 or of 1849 or of 1858, in respect to information or disclosures to clergymen or attorneys, but these were incorporated in the revision of 1878, and it appears from the note of the revisers that sections 4074 and 4076, in respect to communications to clergymen and to attorneys, were taken from sections 833 and 835 of the New York Code of 1877; hence the diversity of phraseology in the section in relation to physicians is much less significant, having occurred from revision, than it otherwise would be. Under statutes providing that a professional witness "shall not be *allowed* to disclose" information so acquired, it has been held in a great number of cases, and with entire uniformity so far as we have been able to discover, that the privilege is that of the patient, client, etc., and the information or disclosure cannot be given in evidence against him, or persons claiming under him, unless waived. "After one has gone to his grave, the living are not permitted to impair his fame or disgrace his memory by dragging to light communications and disclosures made under the seal of the statute." *Westover v. Ætna L. Ins. Co.* 99 N. Y. 56–60; *Grattan v. Metropolitan L. Ins. Co.* 80 N. Y. 282; *Edington v. Mut. L. Ins. Co.* 67 N. Y. 185. The disclosure by a physician of information acquired in his professional character,

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in attending on a patient, where not made in the course of his professional duty, is a plain violation of professional propriety, but the law does not prohibit such disclosure in his general intercourse. The statute relates only to his giving testimony in court in relation to information thus acquired, and it should receive, we think, a liberal interpretation, in order to carry out its evident beneficial purposes. It provides that the physician shall not be *compelled* to disclose any information, etc., acquired in his confidential relations with his patient. For whose benefit was this provision intended? Clearly, for the benefit of the patient, whose interests, reputation, and sensibilities may be injured and grossly outraged by its disclosure. The fact that the physician acquired the information in order to prescribe for or treat the patient cannot affect the physician in the least degree unfavorably, nor that he should be compelled to disclose as a witness the information or knowledge thus acquired. The object of the section, therefore, was to protect the patient, to whom protection was so important, and not the physician, to whom it was quite unimportant, from the consequences of such disclosure, and shows that the provision that the physician shall not be *compelled* to make the disclosure as a witness renders the statement of the patient privileged as to him, and that this was within the intention of the makers of the statute clearly implied from its language, and that it should not be disclosed by the physician without his consent. In *U. S. v. Babbit*, 1 Black, 55, it was held that "What is implied in a statute, pleading, contract, or will is as much a part of it as what is expressed." *Board of Sup'rs of Wood Co. v. Lackawana I. & C. Co.* 93 U. S. 624; *Rogers v. Kneeland*, 10 Wend. 250. "And a thing within the intention of the makers of the statute is as much within the statute as if it were within the letter." *People ex rel. Atty. Gen. v. Utica Ins. Co.* 15 Johns. 379; *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 300. In *Harrington v. Smith*, 28 Wis. 43, it

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was held that "The true rule for the construction of statutes is to look to the whole and every part of the statute, and the apparent intention derived from the whole, to the subject matter, to the effects and consequences, and the reason and spirit of the law, and thus to ascertain the true meaning of the legislature, though the meaning so ascertained may sometimes conflict with the literal sense of the words." Within these rules, we think that it is a clear and justifiable inference from the section under consideration, and the cause and apparent necessity of making the statute, that the information of the physician, so acquired, is privileged as to the patient, and that the physician can neither be compelled nor allowed to disclose it, as a witness, against the will or without the consent of the patient. This interpretation gives the law the beneficial effect it was evidently designed to have, while by the literal meaning of its language it would be rendered of little or no practical effect. We think that the court erred in admitting the testimony of the physicians thus objected to.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

NEWMAN, J. The difficulty of construction which Mr. Justice PINNEY mentions does not appear until it is attempted to put upon the statute a meaning not found in its words. No person will assert that the words of sec. 4075, R. S., in their natural and grammatical sense, import what the majority of the court hold that the legislature intended to declare. The court have put into the statute a thought not found there. Something has been added which the words do not express, and which the legislature has not declared. The words "allowed" and "compelled" are not equivalents, but are words of radically different force and meaning. Ordinarily, the plain grammatical sense and meaning of the words of the statute is to be deemed the law de-

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clared by it. The purpose of the interpretation of a statute is to find out what the legislature intended by the words used. Where the words used are plain and unambiguous, the thought which they express is the law. The words of this statute are plain and unambiguous. They have but a single meaning, and that is plain and incapable of being misunderstood. They plainly import, in their ordinary and grammatical sense, that, while the physician may be permitted to disclose information which he has obtained through his professional relations to a patient, he shall not be compelled to do so. No other meaning can be legitimately drawn from them. This fundamental rule of interpretation is stated by JOHNSON, J., in *Newell v. People ex rel. Phelps*, 7 N. Y. 9, 97, as follows: "Whether we are considering an agreement between parties, a statute, or a constitution, with a view to its interpretation, the thing we are to seek is *the thought which it expresses.* To ascertain this, the first resort, in all cases, is to the natural signification of the words employed, in the order and grammatical arrangement in which the framers of the instrument have placed them. If, thus regarded, the words embody a definite meaning, which involves no absurdity and no contradiction between different parts of the same writing, then that meaning, apparent upon the face of the instrument, is the one which, alone, we are at liberty to say was intended to be conveyed. In such a case there is no room for construction. That which the words declare is the meaning of the instrument, and neither courts nor legislatures have the right to add to or to take away from that meaning." This rule is quoted by Judge Cooley in Cooley, Const. Lim. (6th ed.), 71. It has often been declared by this court (*Ogden v. Glidden*, 9 Wis. 46, 52; *Battis v. Hamlin*, 22 Wis. 669; *Brightman v. Kirner*, 22 Wis. 54; *Mundt v. S. & F. du L. R. Co.* 31 Wis. 451, 457; *Boland v. Gillett*, 44 Wis. 329; *Gowan v. Hanson*, 55 Wis. 341; *Gilbert v. Dutruit*, 91 Wis. 661; Suth. St. Const.

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§§ 236–238, 258, 259), and is now, at least, elementary. As stated by Mr. Justice MARSHALL in *Gilbert v. Dutruit, supra*, quoting Vattel: "It is not allowable to interpret what has no need of interpretation. When the meaning is evident, and leads to no absurd conclusions, there can be no reason for refusing to admit the meaning which the words naturally present. To go elsewhere in search of conjecture in order to restrict or extend the act would be but an attempt to elude it. Such a method, if once admitted, would be exceedingly dangerous, for there would be no law, however definite and precise in its language, which might not, by interpretation, be rendered useless." The decision in this case is an entire departure from the rule. There is no evidence in the statute itself, or outside of it, or in the context, of a purpose variant from the obvious meaning of the words, but, on the contrary, rather, that the words were chosen with care and precision, to make the intent plain. This is always to be presumed, but the context, so to speak, and the history of this statute, re-enforce this presumption. This statute (sec. 4075) is found between two sections which are *in pari materia* with it,— the privilege of confessions to clergymen (sec. 4074), and the privilege of communications to attorneys at law (sec. 4076),— in both of which the declaration is that they "shall not be *allowed* to disclose," while this is that they "shall not be *compelled* to disclose." This section was adopted from New York in 1839. It is found in the Revised Statutes of that state of 1829, as sec. 73, p. 406. It was adopted here, with the change of but one word. The words of the New York statute were, "No physician . . . shall be allowed to disclose;" enacted here, "No physician . . . shall be compelled to disclose." The change is palpable, and the purpose evident. That the legislature did not intend to adopt the New York statute unchanged, is manifest. That it did not intend the statute, as adopted, to be of the same scope and effect as the New York statute, must be equally

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manifest. Identity of effect can be produced only by a forced construction. Legitimate interpretation cannot produce it. The statute is interpreted as if it read: "No physician . . . shall be allowed to disclose . . . if the patient or his representatives object." Can it be asserted that nothing has been added to the statute by construction? No similar statute existed in Michigan previous to the separation. The New York statute was enacted *verbatim* there in 1846. This statute made an appreciable change and advance from the law as it was before its enactment. Before the enactment of this statute, at common law, there was no privilege to the knowledge of physicians, acquired through professional relations. They could be compelled to disclose their information. It was a distinct change and advance when they could no longer be *compelled* to disclose such information. Statutes which change the common law as it existed at the time of their passage are held to change the common law only so far as the clear intent of the language employed absolutely requires. *Fitzgerald v. Quann*, 109 N. Y. 441; *Tompkins v. Hunter*, 149 N. Y. 117; Suth. St. Const. §§ 139, 290, 400. "It is not to be presumed that the legislature intended to make any innovation upon the common law, further than the case absolutely required. The law rather infers that the act did *not* intend to make any alteration other than what is specified, and *besides* what has been plainly pronounced." *Farrall v. Shea*, 66 Wis. 561, 566. So it seems clear that that is as far as the legislature intended to go in that direction. It is, indeed, sometimes permissible to construe statutes contrary to the natural grammatical meaning of the words, to advance an evident intention; but it can never be permissible to construe words against, nor to add to, their natural meaning, in order to carry out some supposed policy of the legislature, or to conform it to the court's ideal. That is to legislate. *Gowan v. Hanson*, *supra*. It will hardly be denied that the statute

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has been improved in the process of construction. Yet it is wiser to let the legislature make the statute law. It is better if the profession, at least, can recognize the law when it is read upon the statute page. This statute should be left as the legislature made it. The evidence was properly received. The physicians were not compelled to disclose. The judgment of the circuit court should be affirmed.

NASH, Administratrix, Respondent, vs. THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

February 3 — February 23, 1897.

Master and servant: Negligence: Assumption of risk.

If a brakeman of considerable experience, who has had his attention called to and has read a printed notice issued by the railroad company employing him and conspicuously posted about its depot and yards, warning brakemen that extra care is necessary in coupling cars loaded with lumber which projects beyond the end of the car (a not unusual way of loading them), to prevent the hand, arm, or body from being caught by such lumber, attempts to couple an engine to a freight car so loaded with projecting lumber and is crushed in the attempt, he must be held to have assumed the risk, and no recovery can be had for his death.

APPEAL from a judgment of the circuit court for Juneau county: O. B. WYMAN, Circuit Judge. *Reversed.*

The action is brought to recover damages for the death of Michael Nash. The deceased was engaged in the employment of brakeman on defendant's road. He was killed while attempting to couple a flat car loaded with timber to an engine. The timber was so loaded that it projected over the body of the car about even with the draft iron, which was about ten inches below the floor of the car. The engine was backing down slowly towards the car. As it neared the car,

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deceased got off the engine from the rear end of the tender, adjusted the link in the draft iron of the tender, walked back to the car and adjusted the pin in the draft iron of the car, stepped out to the side of the track, and gave a signal to the engineer. The safe way of making such a coupling is to stoop, so that the body shall be below the timber. When the engine had approached sufficiently near to the car, the deceased passed in to make the coupling. He did not stoop, but stood erect, and was crushed and killed. The deceased was twenty-four years old. He had been engaged in this employment for the defendant for about two months. He had been in similar employment elsewhere before. Cars loaded in the manner in which this one was loaded were frequent in defendant's trains, and it was a busy road. His attention had been specially called to and he had read a printed notice which was posted on all of the cabooses of freight trains, yard masters' offices, switchmen's shanties, and other places frequented by brakemen in the course of their employment, which notified them that extra care must be used to prevent the hand, arm, or body from being caught "between the lumber, rails, or other material which projects beyond the end of the car." The defendant asked the direction of a verdict for the defendant, which was denied. There was a general verdict and judgment for the plaintiff, from which this appeal is taken.

For the appellant there was a brief by *George R. Peck* and *H. H. Field*, and oral argument by *Mr. Field*.

For the respondent there was a brief by *Winsor & Winsor*, and oral argument by *H. Winsor*.

NEWMAN, J. The claim of the plaintiff is stated in the brief as follows: "Respondent rests upon the statement that the death of Nash was brought about by the unusual and dangerous manner of loading the lumber car over the end, in conjunction, possibly, with the fact of the short draw-

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head on the rear of the tender." The defendant's contention is that the death was from one of the ordinary risks of the employment. That is the only question. Sometimes questions become clear by a recurrence to elementary principles. None other are involved here. The fact that the deceased was killed while engaged in coupling cars for the defendant does not, alone, make the defendant liable for his death. It is liable only in case it failed to perform some duty which it owed to the deceased. The deceased, by undertaking the employment, assumed all the ordinary risks of the employment, as the business was, in fact, carried on by the defendant, so far as they were obvious to persons of ordinary intelligence, judgment, and discretion, or could be discovered by due attention. The defendant is not liable unless it exposed him to unusual dangers. The testimony does not sustain the plaintiff's claim that the manner in which this car was loaded was unusual. On the contrary, it abundantly establishes the fact that that is a very common manner of loading with lumber or timber, and that cars so loaded were frequent in defendant's trains during the time when the deceased was so employed as brakeman. The deceased must have been familiar with them. Besides, his attention had been specially called to a printed notice warning brakemen of the danger, in coupling such cars, of getting the limbs or body caught "between the lumber, rails, or other material which projects beyond the end of the car." Besides, the danger was obvious to men of ordinary intelligence, judgment, and discretion. He could not have been ignorant of the manner in which the car was loaded, for that was obvious to his senses. Besides, it was necessarily forced upon his attention while setting the pin in the drawhead, which was under the projecting timber. Clearly, this was one of the risks which he assumed when he entered upon the employment. It was not negligence to put cars loaded in that manner into defendant's trains.

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When the employee assents to perform the duty assigned to him, and incurs the dangers to which he will be exposed thereby, having sufficient intelligence, judgment, and discretion to enable him to comprehend them, it is not a question whether such service might, with reasonable care and expense, have been made more safe. His assent has dispensed with the performance on the part of the employer of the duty to make it so. Having consented to serve in the way and manner in which the business was being conducted, he has no ground of complaint, even if reasonable precautions have been neglected. *Casey v. C., St. P., M. & O. R. Co.* 90 Wis. 113, and cases cited; *Holt v. C., M. & St. P. R. Co.* 94 Wis. 596; *Showalter v. Fairbanks, Morse & Co.* 88 Wis. 376; *Erdman v. Illinois Steel Co., ante*, p. 6. The adult employee is presumed to understand and comprehend the ordinary risks of his employment. *Jones v. Florence Mining Co.* 66 Wis. 268–282; *Holt v. C., M. & St. P. R. Co., supra.*

But it is said that the drawhead on the tender was shorter by several inches than the drawhead of ordinary freight cars, and that that might have misled him. It is said that he might not have known this fact, or have been temporarily forgetful of it. It is suggested that, with seven inches more of space between the end of the timber and the tender, he might have come from the collision in safety, as if he could speculate upon such chances without the imputation of negligence. Doubtless he was, for the moment, oblivious of the danger attending the performance of the act he was about to perform. It cannot be assumed that he intended suicide. His forgetfulness was his own misfortune, rather than the defendant's fault. It was one of the risks of the employment which he had assumed. There is no conflict in the testimony. The inference proper to be drawn from the testimony is not in doubt. It is not shown that the defendant failed in any duty which it owed to the deceased. The death was due to one of the ordinary risks of the employ-

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ment. A verdict for the defendant should have been directed.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded for a new trial.

BRYANT and another, Appellants, vs. PIERCE, Respondent.

February 4 — February 23, 1897.

Will, contest of: Verdict in will case: Evidence: Testamentary capacity: Undue influence.

1. The verdict of a jury in a contest as to the probate of a will has substantially the same advisory effect as a verdict on a feigned issue in chancery, and consequently exceptions to the admission of testimony cannot work a reversal on appeal.
2. Evidence that during the last three or four years of the testator's life his manner of living and of doing business and his habits in some other respects had materially changed, and he had associated with immoral women, sustains a verdict that he had not mental capacity to make a valid will.
3. An impaired and enfeebled condition of mind renders a person more susceptible to undue influence, and where a will is contested on that ground, the prior and subsequent declarations of the testator are admissible in evidence to prove or disprove his capacity to discover and resist importunities, flatteries, or other acts tending to unduly influence him. The previous relations, friendships, and intercourse between the testator and the several parties concerned, and the physical and mental condition of the testator, may be shown, as well as the circumstances under which the will was executed.
4. A judgment denying probate of a will because of the mental incapacity of the testator and of undue influence, found by both court and jury upon sufficient evidence, will not be disturbed on appeal.

APPEAL from a judgment of the circuit court for La Crosse county: O. B. WYMAN, Circuit Judge. *Affirmed.*

This is an appeal from a judgment refusing to admit to probate a paper writing dated March 24, 1893, purport-

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ing to be the last will and testament of George H. Pierce, deceased. It appears from the record: That the deceased was born in Massachusetts, June 17, 1829. That he was a machinist by trade. That he married and moved to Boston. That January 3, 1853, his first child, the contestant herein, was born. That in the spring of 1858 the deceased came west, and settled at Warren, Illinois. That his wife and child followed in the fall of 1858. That in 1859 they moved to Mineral Point. That he became a master mechanic at that place. That they continued to live at Mineral Point until 1873, when he separated from his wife, and with his three children moved to La Crosse, and bought a sash, door, and blind factory. That he had in all four children by his first wife, to wit: Lucy, born August 15, 1860, and who married, but died March 17, 1881, without issue; Gertie, born in 1866, and who married in June, 1888, and died December 26, 1892, without issue; and Wilbor, who was born and died at Mineral Point, when about seven years of age; and the contestant, who was nearly of age when he moved to La Crosse. That the contestant, *Frank A.*, worked for his father until after he became of age, in 1874, and then went to Chicago, where he was married November 6, 1875, and the next year he and his wife went to California, where he remained until 1880, when he visited his father, at his request. That during all that time he had kept up a friendly correspondence with his father and mother. That in the meantime he had become the father of four children. That after the deceased had lived separate and apart from the mother of his children five years or more, and some time prior to 1880, they were divorced, in a suit brought by the wife. That about that time the deceased married a second wife, with whom he lived until June, 1888, when she died. That Mr. Granke, father of the sole legatee and devisee, died October 10, 1890. That he was a saloon keeper, and used to work for the deceased. That at the time of his death he owned

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property on Rose street and Caledonia street. That after his death his widow, Mrs. Granke, rented the saloon property on Rose street to Hattie Lovejoy for a millinery store, and part of the time lived upstairs with her family over the store, and part of the time on Caledonia street. That the deceased was first known to go with any of Mrs. Granke's family in February, 1892, when he took Tillie, her youngest daughter, to the theater. That he went with her some from that time until the Granke family moved to Chicago, in May, 1892. That Tillie got married July 13, 1892. That the deceased went with *Miss Adeline M. Granke* some in the winter of 1892–93. That a witness, Dunlap, who was in the testator's office in 1892, testifies that sometime in the late summer or early fall of 1892 he opened a letter addressed to the deceased, written by *Adeline*, from Chicago, and gives the substance of it from memory, to the effect that she said to him: "I hope you will excuse me, a stranger, for addressing such a letter to you. I hope you will excuse Tillie for what she has done. You know she is young and giddy." He then said: "It went on, and asked if she could not, in effect, take Tillie's place." He said again: "It was a two-page letter. It was simply palaver and formal. I cannot tell you what it was. It was simply this, in numerous words: 'Will you consider me in Tillie's place?'" That March 24, 1893, the testator went alone to the office of his attorney, and caused to be drawn up, and then and there executed, the instrument here in dispute, and which instrument is to the effect that, after the payment of his just debts and funeral expenses, he gave, devised, and bequeathed unto *Miss Adeline M. Granke*, of La Crosse, all the rest, residue, and remainder of his estate, both real, personal, and mixed. That said instrument also contained this provision: "(2) I have heretofore given to and expended for my son *Frank Allen Pierce* a sufficient sum. I have not seen or heard from him in many years, and do not even know that

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he is alive, but, in the event of his being alive, I make no provision for him." That this instrument was duly attested in the presence of two subscribing witnesses, and is in all respects the same as the will executed by him December 23, 1892, being three days before the death of his daughter Gertie, except that he had bequeathed therein to Gertie a legacy of $500. That just prior to the will of December 23, 1892, he had been quite sick. That June 15, 1893, the deceased conveyed to *Miss Adeline M. Granke* lots 2 and 3, block 13, of the original plat of the village of North La Crosse, recorded July 17, 1893, reciting a consideration of $1,100. That June 19, 1893, the deceased was secretly married to *Adeline M. Granke*. That July 31, 1893, the deceased and *Adeline M.*, his wife, conveyed the same lots to *Benjamin F. Bryant*, reciting a consideration of $5,000, and the same was recorded August 2, 1893. That July 31, 1893, *Benjamin F. Bryant* conveyed, by quitclaim deed, to *Mrs. Adeline M. Pierce*, the same premises, reciting a consideration of $5,500, and the same was recorded August 2, 1893. That February 9, 1894, the alleged testator died, leaving an estate which the contestant claims to be of the value of $25,000. That August 13, 1894, the will of March 24, 1893, was admitted to probate in the county court after a contest.

The contestant having appealed from that judgment to the circuit court, the case was retried, and at the close of the trial the jury returned a special verdict, to the effect (1) that the will of George H. Pierce in controversy was made, signed, witnessed, and executed in due form of law; (2) that said George H. Pierce, March 24, 1893, when the proposed will was made, was not of sound and disposing mind and memory; (3) that George H. Pierce, at the time of making said will, was under undue or improper influence on the part of *Adeline M. Granke*, Caroline Granke (the mother), Clara Granke, and Tillie Granke, or one or two of

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said persons, which influenced said Pierce to make the proposed will. Upon that verdict, the contestant duly moved for judgment disallowing the probate of the instrument as the last will of said George H. Pierce, deceased; and the proponent duly made his motion that the court disregard said verdict, and find in favor of the proponent upon all the issues submitted in this case, and upon such finding admit to probate said instrument, propounded as the last will and testament of said George H. Pierce, deceased, or else set aside the verdict, and grant a new trial.

After stating certain things which tended to show the mental capacity of the deceased at the time of making the alleged will, and that it was not procured by undue influence, the trial court, among other things, expressed the following opinion:

"On the other hand, there are many circumstances in this case which tend to support the contention of the contestant on these two propositions. . . . The whole life of the deceased has been before the court, in a measure, by the testimony in this case; and it clearly appears that his manner of living and his manner of doing business and his habits in some respects were materially different during the last two or three years of his life than they had been before, while he was a resident of this city. His associations, to say the least, were peculiar, and the evidence tends to show that he associated with people of questionable repute; and the testimony tends to show that the management and care of his entire property was essentially different in the past two or three years of his life than it was before. This question was submitted to the jury, and the jury in this case have found that these changes in the method of doing business, and changes in the character of his associates, show, from the facts and circumstances in this case, that he was not in his usual sane mind. The evidence on this point is conflicting. There is evidence which, if taken as true and consid-

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ered as true, certainly establishes the proposition that he was of sufficient mind and disposing memory to make a valid will, and there is other evidence in this case which, if true, is sufficient to support the contention of the contestant in this case that he was not of sufficient mental capacity to make a valid will at this time. The controversy and this dispute upon the evidence in this case was submitted to the jury.

"The case was quite carefully tried, fully considered, ably argued, and the jury, in passing upon this matter, have found, as a matter of fact, that he was not of sufficiently sound mind and disposing memory at the time this will was made to make a valid will. And the question now comes as to whether the court shall disregard this finding of the jury, and set this finding aside on this controverted question, and declare and decree that he was of sufficient mental capacity to make a valid will at that time. . . . In view of this contradictory testimony, the court is inclined to think, and the judgment of the court is, that the verdict of the jury should be respected, and that the court should be guided, in a measure, as far as the facts are concerned, by the determination of twelve jurors upon this controverted part of the testimony.

"Further, as to the question of undue and improper influence on the part of *Miss Granke:* This is one of the important features of this case. Taking any part of the testimony alone, the court is unable to say that any single circumstance of itself is sufficient to support the finding of the jury that there was undue influence exerted upon Mr. Pierce at the time this will was made. But there are many circumstances which tend to show that there might be undue influence, and the jury have found, from all the evidence in this case, and from the circumstances that were shown on the trial by several witnesses,—taking these circumstances together,—they formed the opinion, and so expressed it in

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their verdict, that there was such undue influence exerted upon Mr. Pierce at this time by *Miss Granke* that it was not the will of Mr. Pierce, but was the will of *Miss Granke*, that was made on the 24th of March, 1893, by the deceased. On this branch of the case there is plenty of evidence which supports the finding, and there is evidence which, if true, supports the proposition contended for by the contestant in this case; and on this controverted part of the evidence the jury have found, as a matter of fact, that she did exercise such undue influence upon the deceased that this instrument was not the instrument of the deceased, but was rather her will and her request, and that the influence was undue. So that the judgment of the court is that this finding of the jury on this controverted evidence should be respected by the court, and that this finding should aid the court in determining what the fact is in this case; and, guided by the verdict of the jury, the court is of the opinion that the verdict of the jury shall be adopted and considered by the court as the finding of the court upon these two motions; and, as such, the motion of the contestant will be granted in this case, that the probating of the will be refused, and the probating of the will be disallowed; that judgment be rendered that the proposed will be declared not the proposed will and testament of the deceased."

From the judgment entered pursuant to the verdict and the findings of the court, the proponent and the legatee named in the will bring this appeal.

For the appellants there was a brief by *Losey & Woodward*, and oral argument by *B. F. Bryant* and *G. M. Woodward*. They contended that there was no affirmative evidence of undue influence, and that evidence of the reputation of the sole legatee for chastity was improper and did not tend to prove undue influence. That such influence will be presumed when parties live in immoral relations is not the law. *Main v. Ryder*, 84 Pa. St. 217, 225; *Wainwright's*

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Appeal, 89 id. 220; *Heilbrun's Estate*, 9 Pa. Co. Ct. R. 350. That fact may be considered only in connection with affirmative evidence. *Matter of Mondorf's Will*, 110 N. Y. 450, 456; *Kessinger v. Kessinger*, 37 Ind. 340; *Monroe v. Barclay*, 17 Ohio St. 302, 314, 317; *Davis v. Calvert*, 5 Gill & J. 269; *McClure v. McClure*, 86 Tenn. 173. The admission of testimony as to the habits, conduct, and bearing of the testator, and of his declarations was improper. So, also, was the refusal to allow a physician to testify as to his sanity. *Fraser v. Jennison*, 42 Mich. 209, 224; *Denning v. Butcher*, 91 Iowa, 425; *Will of Jenkins*, 43 Wis. 610.

For the respondent there were separate briefs by *Winter, Esch & Winter* and *Bleekman, Bloomingdale & Bergh*, and oral argument by *A. E. Bleekman* and *F. Winter*.

CASSODAY, C. J. A general outline of the facts in the case and a considerable portion of the opinion of the trial court have been given. The testimony is voluminous. Several exceptions are taken to the admissions of testimony. Assuming that some of the exceptions are well taken, yet, as the verdict in such a case has substantially the same effect as a verdict on a feigned issue in chancery, it is manifest that such exceptions cannot work a reversal. *In re Jackman's Will*, 26 Wis. 104; *Chafin Will Case*, 32 Wis. 557, 569; *Wright v. Jackson*, 59 Wis. 584; *Loughney v. Loughney*, 87 Wis. 101. This is the well-settled rule in equity cases. The rule is recognized by counsel for the appellants, for they say that they make these assignments of error "simply as the most convenient way of exhibiting to this court the peculiarities of the trial, and the circumstances under which the court reached its conclusions," and "that this court will pass upon the whole record, and, excluding improper testimony from consideration, will determine whether the judgment is to stand." The declarations of the deceased were certainly competent evidence on the subject of his mental capacity.

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Upon the question of the mental capacity of the deceased, the trial court, among other things, in effect said that, during the last two or three years of his life, his manner of living and his manner of doing business and his habits in some respects were materially different than previously. Such changes are frequently evidence of impaired and enfeebled intellectual faculties, which are liable to end in mental decay and idiocy. The trial court, upon this point, further said: "There is evidence which, if taken as true and considered as true, certainly establishes the proposition that he was of sufficient mind and disposing memory to make a valid will, and there is other evidence in this case which, if true, is sufficient to support the contention of the contestant in this case that he was not of sufficient mental capacity to make a valid will at this time." Consequently, the court acquiesced in the verdict of the jury, and held that the deceased did not have the mental capacity to make a valid will at the time the instrument in question was executed. We have grave doubt as to this conclusion from the evidence upon the mere question of the mental capacity of the deceased to make a valid will had no undue influence been brought to bear upon him. But such impaired and enfeebled condition of his mind necessarily made him more susceptible to such influence. It is upon this theory that prior and subsequent declarations of the testator are admissible in evidence on the question of undue influence. True, such declarations are not evidence that extraneous and undue influence was actually exerted, but were to prove or disprove the capacity of the testator to discover and resist importunities, flatteries, or other acts tending to undue influence. The weaker or more susceptible the mind of the testator, the less artifice will be required to mislead, pervert, or deceive it. As said in another case, undue influence "is a subtle species of fraud, whereby mastery is obtained over the mind of the victim by insidious approaches, seductive artifices, or other species

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of circumvention. From the very nature of such influence, the evidence, generally, is wholly or almost wholly circumstantial. The questions to be considered are not confined to the conduct of the favored legatee and his friends, constituting the alleged undue influence, but extend to the susceptibility of the testator to the peculiar influences brought to bear upon him, and his capacity to discover and resist such approaches and importunities. The previous relations, friendships, and intercourse between the testator and the several parties concerned, and the physical and mental conditions of the testator, therefore, as well as the circumstances under which the will was executed, are important to be considered." *Will of Slinger*, 72 Wis. 27. The brief of counsel for the proponent and legatee concedes that "some of the testimony given on both sides tends to show that the testator was habitually loose and immoral in his relation with women. It also appears that for several years before his death he was troubled with disease of the bladder and urinary organs, from which at different times he suffered intensely, and that he was very emotional." When passion has the mastery, the intellectual faculties are naturally weakened, and the judgment and power of volition impaired. Especially is this true when the victim has a disease which stimulates the passion. It can serve no purpose to recite evidence on this question. The trial court said: "His associations, to say the least, were peculiar, and the evidence tends to show that he associated with people of questionable repute;" and further said that the jury "formed the opinion, and so expressed it in their verdict, that there was such undue influence exerted upon Mr. Pierce at this time by *Miss Granke* that it was not the will of Mr. Pierce, but the will of *Miss Granke*, that was made on the 24th day of March, 1893, by the deceased. On this branch of the case there is plenty of evidence which supports the finding, and there is evidence which, if true, supports the proposi-

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tion contended for by the contestant in this case; and on this controverted part of the evidence the jury have found, as a matter of fact, that she did exercise such undue influence upon the deceased that this instrument was not the instrument of the deceased, but was rather her will and her request, and that the influence was undue." And so the finding of the jury upon that question is adopted as the finding of the court. It is to be remembered that "the influence of an unlawful relationship is naturally and ordinarily unlawful, in so far as it respects testamentary dispositions favorable to the unlawful relationship, and unfavorable to the lawful heir. This was so held in a case where the testator was living in adulterous intercourse with the mother of the beneficiaries. *Dean v. Negley*, 41 Pa. St. 312. This is somewhat similar in principle to the case at bar." *Will of Slinger*, 72 Wis. 35. See, also, *Leighton v. Orr*, 44 Iowa, 679. We do not feel justified in disturbing the finding of the fact of undue influence, thus sanctioned by both the court and the jury. They certainly had far better opportunities for weighing the evidence, and rendering an accurate conclusion as to the facts, than this court; and, after careful consideration, we are constrained to follow and sanction their judgment. *Moore v. McDonald*, 68 Md. 321.

The error assigned for excluding a portion of the testimony of the physician who attended the deceased, by reason of the provisions of sec. 4075, R. S., must be overruled, for the reasons given in an opinion filed herewith by Mr. Justice PINNEY, in *Boyle v. N. W. Mut. R. Asso.*, *ante*, p. 312. Other errors are assigned, but it is believed that they are substantially covered by what has already been said.

By the Court.— The judgment of the circuit court is affirmed.

On March 24, 1897, on motion of the appellants, an order was entered making the taxable costs of both parties in this court payable out of the estate.

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HOFFMAN & BILLINGS MANUFACTURING COMPANY, Appellant, vs. BURDICK and another, Respondents.

February 4 — February 23, 1897.

Appeal, dismissal for insufficient return.

Unless the affidavits on which the court below acted in making the order appealed from are returned with the record, the supreme court will dismiss the appeal, even though they had never been filed in the court below. All papers must come to that court under the certificate of the clerk of the lower court and cannot be filed for the first time in the supreme court.

APPEAL from an order of the circuit court for Waupaca county: CHAS. M. WEBB, Circuit Judge. *Appeal dismissed.*

This was an action of replevin to recover possession of a stationary engine which formed the motive power of an electric lighting plant at New London. Judgment by default was rendered for the plaintiff, adjudging return of the engine or the recovery of $1,200, the adjudged value, in case delivery could not be had. The judgment was paid two days later by one Sherman, the owner of the real estate. It appears that afterwards the defendants moved upon affidavits for an order vacating the judgment. The motion was opposed and counter affidavits filed, and on March 6, 1896, the court made an order that the plaintiff pay the defendants $206.60, with motion costs, within twenty days, or that in default of such payment the judgment be vacated. From this order the plaintiff appealed.

For the appellant there was a brief by *Gerrit T. Thorn*, attorney, and *W. W. Gilman*, of counsel, and oral argument by *Mr. Gilman.*

For the respondents the case was submitted on a brief by *Cate, Sanborn, Lamoreaux & Park.*

WINSLOW, J. The affidavits upon which the order appealed from was founded are not returned with the record,

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and it affirmatively appears by the certificate of the clerk that they were never filed. Thus the papers upon which the court acted in making the order are not before us. In such case it is well settled that the court will dismiss the appeal because the return is insufficient to enable the court to review the order appealed from. *Glover v. Wells & M. Grain Co.* 93 Wis. 13. It is the appellant's duty to see that the proper return is made to this court. He could have obtained an order authorizing the filing of copies in case the originals were lost or withheld from the files. R. S. sec. 2835. Two packages of papers were produced on the argument, with the assurance that they were the motion papers or copies of the motion papers used below, and request was made that they be filed in this court and considered on this appeal. We cannot do this. In appeal cases all papers essential to the record must come to this court under the certificate of the clerk of the court below. *Tyson v. Tyson*, 94 Wis. 225.

By the Court.— Appeal dismissed.

MILLERD and another, Administrators, Respondents, vs. THOMPSON, Administratrix, Appellant.

February 4 — February 23, 1897.

Agency: Evidence: Error, when harmless.

1. In an action for the price of sleds alleged to have been sold by M. to Q. on his representation that he was authorized by T., deceased, of whom the defendant is administratrix, to buy them in his name, he giving an order on T. for the price, *held*, that letters written by T. to M. after he had been notified of the purchase, in the first of which he asked for time for payment, in the second of which, written four months later, he promised to send the money soon, and in the third, some two months later, he asked M. to come to his place if Q. had not paid for the sleds, and they

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would determine what should be done, though not constituting any part of the contract, were competent evidence as to Q.'s authority to buy the sleds on the credit of T., to be considered by the jury for what they were worth in connection with all the other evidence.

2. The exclusion of an answer to a question asking an explanation of letters put in evidence, if error, is harmless where the witness had already testified fully as to all that the question was calculated to elicit.

APPEAL from a judgment of the circuit court for Waupaca county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

This action was brought for the recovery of the price or value of four sets of logging sleighs, amounting to $200, alleged to have been sold by the plaintiffs' intestate, Ira Millerd, in his lifetime, to H. D. Quant, at the special instance and request of Ira Thompson, in his lifetime, and the answer was a general denial. At the trial, before a jury, H. D. Quant testified that Ira Thompson, the defendant's intestate, sent him to New London to see Millerd, and to buy the sleds of him. Four sets were spoken of, but more if he needed them. That he bought them by Thompson's orders, and that he was acting as his agent, and communicated that fact to Millerd, and the price agreed on was $50 a set. That he gave Millerd an order on Thompson, and told him that he would want some time on the sleighs. On cross-examination he testified he expected he bought those sleds for his own benefit, but by the order of Mr. Thompson, for whom he was logging and with whom he had a contract, by which he was to put in certain timber. He was not putting in the timber by the thousand, but by the cord. That it was pulp wood. That he did not tell Millerd that he was buying these sleds for Thompson, or buying them for himself, either way. He did not know that the question was asked, but told him that he was sent there to buy them by Mr. Thompson. That he thought he gave him to understand that he was buying them as Thompson's agent. This was Decem-

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ber 20, 1892. On the 23d of December, 1892, Quant wrote to Thompson a letter in which he said: "I bought four sets of sleighs of Millerd, and gave him an order on you; he will give you time on them." Thompson thereupon wrote to Millerd, December 24th, saying it would be an accommodation for him "to wait until I begin to draw some pay from my pulp wood, which will be in the course of about thirty days, when I can pay you in full." April 25th Millerd wrote Thompson, referring to the last letter, and asking, "Do you want any longer time? If so, please state what." April 27, 1893, Thompson wrote to Millerd, in reply, saying: "If it is perfectly satisfactory to you, I would like to give you a note for six months, bearing interest. If it was convenient for me to pay it now, I would not ask this; but if you prefer any different arrangement I will try and make it. Write and let me know what you can do." A letter dated September 7, 1893, from Thompson to Millerd, in reply to one from Millerd of the 5th of September, was to the effect that "it will be impossible to send it this week, but as soon as I can collect in some I will send it to you." December 6, 1893, Thompson wrote to Millerd: "Has Quant settled with you for those sleds? If not, I want you to get what you can out of the sleds, and the balance is what I consider you can hold me for. If he has not settled for them, please come down and let me know, and we will talk it over and conclude what is best to be done." Evidence was given tending to show that *A. W. Millerd*, son of Ira Millerd, acted as agent for his father about his business during the latter part of his life, and he testified to a conversation between himself and Quant at the time the sleds were purchased, in which the latter said that he wanted the sleds for Mr. Thompson, and said that Thompson would pay for them, and that he subsequently notified Thompson, by letter of December 23, 1892; that in the spring of 1893 he had a conversation with Thompson in relation to the sleds, in which the latter said that Quant was

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behind in his logging business with him, and that he was willing to pay for the sleds, but that he would like to have him assist him in getting possession of the sleds, and having them turned over from Quant to himself, and asked for more time; that the letter he addressed to Thompson notified him of the transaction, and that Quant had the sleds, and that he had said Thompson would pay for them; that he could not give the exact language. Another letter was put in evidence from Millerd to Thompson, dated May 13, 1893, stating that Quant's order on Thompson was dated December 21, 1892, on demand, and proposing to take a note, with six per cent. interest from February 15th up to the time he could best pay, and Millerd testified that Thompson accepted that order.

The defendant testified in his own behalf, as to the contract between himself and Quant, in regard to cutting, piling, and hauling pulp wood by the cord. He denied that he had authorized Quant or sent him to Millerd to buy sleds; that he knew, December 23, 1892, that he had bought sleds of Millerd and given him an order on himself; that it was presented by Ira Millerd, but he did not accept it, and that he was not then owing Quant anything. He testified to having received the letter from Millerd, to the effect that he had sold Quant the sleds, and he had given him an order on him (Thompson); that that was the way the letter read, he thought. He was asked what explanation he made in regard to paying the order when presented. This was objected to, and the objection sustained. He testified that at the time he wrote the letter of December 24, 1892, he did not know that Quant had represented to Millerd that he had bought those sleds for the defendant; that at the time this was written Quant came down there, and represented that he had 1,500 or 1,600 cords cut, and there would have been something coming to him if he had had that amount cut, "and it was on the strength of that I promised, but he did not have it cut, nor half of it." "Q. This letter was writ-

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ten, then, upon the presumption that he had that there, and, if he had, you would have paid it out of what was due him?" Objected to as leading and incompetent, and the court excluded the testimony, ruling that the letter was the best evidence of what was said. That *Arthur Millerd* and Quant in the spring came to see him about making a bill of sale of the sleds from Quant to defendant, and he told *Arthur Millerd* he would pay for them. That he said, "If I was going to pay for the sleighs, I wanted the sleighs," and he claimed that he had sold them to Quant. Quant claimed he needed the sleighs, and wanted him to pay for them. Quant refused to give the sleighs to him. Millerd represented he had sold them to Quant. That his promise in the letter to pay for the sleighs was made upon the strength of Quant's representation of having so much pulp wood cut. That promise was predicated upon the fact that the sleds were delivered to Mr. Quant, so far as Millerd was concerned. That he promised to pay because Quant represented he had got so much pulp wood cut there, but he did not convey that information to Millerd before writing the letter to him which contained the promise.

A. W. Millerd, in rebuttal, testified that he understood Thompson to say that he had sent Quant up to buy the sleighs for him (Thompson), and that Thompson said he would pay for them, and denied having said that he sold the sleds to Quant. Quant, being called on behalf of the defendant, testified that he bought these sleds for himself as well as for Thompson; that there was nothing said about his being sent there by Thompson to buy them; that he did not say anything to Millerd about being sent there by Thompson to buy them, and that the witness did not promise to pay Millerd for them; that he had not represented anything to Millerd more than that he was sent there to buy sleds of him, if he could find any that suited him; that he sold the sleds for the benefit of Mr. Thompson as well as

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himself, as he understood it; that he considered that it was at Thompson's risk he was buying them of Millerd, and for that reason he gave the order on Thompson, and because he was authorized to do so,— to buy the sleds of Millerd,— if he could find those that suited him. On cross-examination he said that it was a part of his contract with Thompson that he (Thompson) was to furnish him with sleighs,— that is, buy them for him,— and they were to be charged to him, of course, but he (Thompson) was to pay for them.

The court charged the jury that if by the fair weight of the evidence they believed that the defendant authorized and empowered Quant to represent to Millerd that he (Thompson) desired or was willing that he (Millerd) should deliver the sleds mentioned to Quant, on the credit of the defendant, that he, the defendant, would be responsible and pay for the sleds so delivered; that Quant so represented to Millerd, and Millerd, believing and acting upon the representations, agreed with Quant upon the sleds to be delivered, and the price thereof, and delivered the same upon the credit of the defendant,— in such case the transaction amounted to a purchase of the sleds by the defendant, who would be liable to Millerd for the contract price, as fully as if the defendant had personally made the contract and himself received a delivery of the sleds, and in such event the plaintiffs would be entitled to a verdict. That if Quant was not authorized in any way by the defendant to represent to Millerd that he desired to buy, or was willing to purchase or become responsible for, the sleds, or desired that Millerd should sell or part with the sleds on the credit of the defendant, and if the defendant did not authorize Quant to make the purchase on his (defendant's) credit, in such case Quant's representations to Millerd — that is, that he had such authority — could not and did not bind the defendant, and in that event the plaintiffs could not recover, if the representations were not shown to have been made by direction of the defendant.

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That the letters introduced in evidence did not of themselves constitute a contract, and, without the aid of other evidence, render the defendant liable to the plaintiffs in the action; but the letters were competent evidence for what the jury should deem them worth, in connection with the remainder of the entire evidence, in determining whether or not the original transfer of the sleds by Millerd was in fact upon the credit of the defendant, and pursuant to authority given by the defendant to Quant to purchase them upon defendant's credit.

The jury found for the plaintiffs in the sum of $200, and a motion for a new trial was made, on the ground that the verdict was against the evidence, and for errors in the charge, and in refusing to receive evidence offered by the defendant to explain the language used in the letter of the 24th of December, 1892, and other letters written by the defendant. The motion was overruled, and plaintiffs had judgment. The defendant appealed.

For the appellant there was a brief by *Gerrit T. Thorn*, attorney, and *W. W. Gilman*, of counsel, and oral argument by *W. W. Gilman*. They argued, *inter alia*, that an agent's authority cannot be established by the statements or admissions of the agent himself, and here there was no other evidence thereof, though the agency was denied by the alleged principal. *Grover & Baker S. M. Co. v. Polhemus*, 34 Mich. 247; *Bacon v. Johnson*, 56 id. 182; *McCarty v. Straus*, 21 La. Ann. 592; *Kelly v. Estate of Strong*, 68 Wis. 152, 157. Evidence should have been received to explain, by the circumstances under which they were written, the letters put in evidence, they not being part of the *res gestæ*. *Lamon v. French*, 25 Wis. 37; *Rockwell v. Mut. L. Ins. Co.* 21 id. 548, 555; *Noble v. Epperly*, 6 Ind. 468; *Bank v. Kennedy*, 17 Wall. 19; *Knapp v. Harden*, 1 Gale, 47; *Sourse v. Marshall*, 23 Ind. 194; *Roe v. Day*, 7 Carr. & P. 705; *Enos v. Tuttle*, 3 Conn. 250; *Russell v. Frisbie*, 19 id. 205; *Carter*

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v. Buchannon, 3 Ga. 513. It was error to instruct the jury that they might infer authority from those letters. 1 Greenl. Ev. § 13, note 2; Stephen's Dig. of Ev. (Chase's ed.), note VI on articles 11, 12; 1 Rice, Ev. § 34.

For the respondents there was a brief by *Felkers, Goldberg & Aarons*, attorneys, and *George Hoxie*, of counsel, and oral argument by *C. W. Felker*.

PINNEY, J. 1. The principal question in this case is whether Quant had authority from the defendant's intestate, Thompson, to buy the sleds on his credit and account, and whether they were accordingly in fact sold by Millerd on his credit and account. This involved, of course, the question of Quant's agency to purchase the sleds on the credit and account of the defendant Thompson. This issue, and the law applicable to it, was clearly explained by the court to the jury, and no exceptions were taken to the leading portion of the charge. There was sufficient evidence to warrant the jury in finding the verdict for the plaintiffs. It is amply sustained by the evidence. We cannot consider whether it is contrary to the weight of evidence.

2. It was agreed by counsel for both parties that the letters of themselves did not constitute a contract between the parties of the purchase and sale of the sleds; that they were not writings of a contractual character,—and the court so instructed the jury, and, further, that the letters were competent evidence for what the jury should deem them worth, in connection with the remainder of the evidence, in determining whether or not the original transfer of the sleds by Millerd to the defendant's intestate was in fact upon the credit of the defendant, and pursuant to authority given by him to Quant to purchase them upon the credit of the defendant. It is said that this instruction was equivalent to saying to the jury that, while the letters did not render the defendant liable and did not constitute a contract, the jury

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might *infer* from them that the defendant authorized Quant to purchase the sleds on his credit. Quant so represented to Millerd, and Millerd, on the faith of such representation, let Quant have the sleds on Thompson's credit. The testimony of Quant, *A. W. Millerd*, the son of the plaintiffs' intestate, and of the defendant's intestate, Thompson, was before the jury, and, as we have said, it tended to make out the case submitted to them. The court did not tell the jury what they might infer from the letters. The more important of the letters were written by the defendant Thompson, after Quant had written him that he (Quant) had "bought four sets of sleighs of Millerd, and gave him an order on you; he will give you time on them." And on the next day the defendant Thompson wrote to Millerd, asking him "to wait until I begin to draw some pay from my pulp, which will be in the course of about thirty days, when I can pay you in full." He afterwards wrote Millerd three other letters, the material portions of which have been stated. The court rightly told the jury that the letters were competent evidence for what the jury should deem them worth, in connection with the other evidence upon the issues stated, and, in substance, that the jury were to determine the issues from the entire evidence.

3. The defendant's counsel, in his examination of the defendant as a witness in his own behalf, sought to draw out from him an explanation of how he came to write the letter of December 24, 1892, and make the acknowledgment it contained; and in answer he stated, in substance, that Quant had represented that he had about 1,500 or 1,600 cords of pulp wood cut, and that there would be something coming to him. "On the strength of that, why, I promised; but he didn't have it cut, nor the half of it." The defendant's counsel, pressing the matter further, said: "This letter was written, then, upon the presumption that he had that there, and if he had, you would have paid it out of what was due him?"

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He had already in substance testified to all that the question was calculated to elicit, but the question was objected to as leading and incompetent. The court stated that "the letter was the best evidence of the language employed, and spoke for itself, and that the witness could not translate it," and sustained the objection. The question was certainly leading, and addressed by counsel to his own client. There was nothing obscure or ambiguous in the language of the letter. The defendant testified quite fully as to the circumstances under which he wrote the letters, and no other evidence offered to explain them was excluded. The exceptions relied on are, we think, without merit. There was no error affecting the substantial rights of the defendant.

By the Court.— The judgment of the circuit court is affirmed.

TICKLER, Respondent, vs. ANDRAE MANUFACTURING COMPANY, Appellant.

February 4 — February 28, 1897.

Master and servant: Damages: Waiver.

1. By retaining in his service a servant, hired for a term to perform work requiring reasonable skill and diligence, after knowledge of the defective quality of his service, and by paying him the stipulated wages in proportion to the time he has worked without objection on that account, the master may waive such breaches of the contract as relate to the quality of the service. His doing so is at least *prima facie* evidence of such waiver.
2. In an action by the servant to recover wages for the balance of the term, on the ground of a wrongful discharge, he is not entitled to have his expenses in seeking other employment deducted from the credit to be allowed the master on account of wages earned elsewhere.

APPEAL from a judgment of the circuit court for Waupaca county: CHAS. M. WEBB, Circuit Judge. *Reversed.*

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The plaintiff was hired by the defendant to work for a year for the agreed wages of $900 a year and $10 for his expenses of removing from Milwaukee to New London. Four months before the end of the year, plaintiff left the employment of the defendant; whether voluntarily or because the defendant discharged him was the main point in dispute. At the time when he left, the defendant paid him the wages in proportion to the time that he had worked, deducting something for lost time. He returned to Milwaukee, where he earned some wages. After the expiration of the year, he brought this action for the balance of the year's wages. The defense was that the plaintiff had quit work on his own accord and against the will of the defendant, and set up three grounds of counterclaim: (1) For damages, because it could not procure the work to be done for the agreed wages, but had to pay a higher wage; (2) for the $10 paid to defendant towards the expense of his removal to New London; and (3) for damages caused by the poor quality of his work. There was a jury trial, resulting in a verdict and judgment for the plaintiff.

For the appellant there was a brief by *Felker, Goldberg & Felker*, and oral argument by *C. W. Felker*.

F. C. Weed, for the respondent.

NEWMAN, J. The jury found for the plaintiff. This determines in his favor the principal issue in the case. It establishes in his favor that he did not abandon the performance of his contract of his own accord, and against the defendant's will; but rather that he was discharged by the defendant, against his will, and for insufficient cause. This, logically, eliminates from the case the defendant's first two counterclaims; for in this aspect of the case it is in no way the plaintiff's fault if the defendant was compelled to pay the party whom it hired to complete the plaintiff's contract more wages than the plaintiff was to have for the same

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work, nor if it lost the advantage which it anticipated from its disbursement of $10 to aid in the removal of the plaintiff to New London. These losses are the natural consequences of its own act. The third counterclaim stands upon reasons somewhat different. The plaintiff's contract required of him reasonable skill and diligence in the execution of his work. Defective performance might furnish ground both for his discharge and for the recovery of damages against him. The trial court admitted the evidence so far as it went to show justification of the discharge, and excluded that which went to sustain the counterclaims. The verdict includes an implication of some force in relation to this contention. The jury considered either that there was too little of merit in this claim of defective service to justify the plaintiff's discharge, or they deemed this breach of the contract to have been waived and condoned by the defendant by its so long retention of the plaintiff in its service with knowledge. Either conclusion was competent under the evidence. The court instructed the jury that the defendant was not entitled to diminution of the plaintiff's recovery on account of such defective service. That the master may waive and condone such breaches of the contract of service as relate to the quality of service by retention of the servant in the service after knowledge of the breach, and by paying the stipulated wages at the stated times, without objection or protest on that account, cannot well be doubted. At least, when unexplained or unexcused, such retention for a long time after knowledge, and such payments, should be at least *prima facie* evidence of such waiver and condonation. Wood, Master & S. (2d ed.), § 123. No explanation or excuse was offered. The *prima facie* case not having been overcome by evidence of explanation or excuse, the court was right, both in its instruction and the exclusion of evidence. The plaintiff, after his discharge, being unable to find work at similar employment at New London, removed

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to Milwaukee, where he obtained work and earned some wages. The jury was instructed, in effect, that in case they found for the plaintiff upon the principal issue, they should give him the amount of the agreed wages for the year, $900, less such sums as he had earned and received from other sources; and that to that result they should add the sum of his reasonable expense in removing himself, his family, and stuff from New London back to Milwaukee, which the testimony showed to have been $35. This was error, for, while the defendant was entitled to be credited by the plaintiff's net earnings only, yet it may fairly claim that its proper credit shall not be diminished by any sum which he shall expend for his own purposes, or for the convenience of his family. The expenses of the return of the family to Milwaukee were not within the defendant's undertaking. For this error the judgment must be reversed. But, as the amount of the error is easily defined, a new trial may be unnecessary.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial, unless within twenty days after the *remittitur* is filed in the circuit court the plaintiff shall remit from the judgment $35 as of the date of the verdict. In case the plaintiff so remits, the judgment is to stand for the balance.

WINKLER, Respondent, vs. FISHER, Appellant.

February 4—February 23, 1897.

Master and servant: Parent's liability for negligence of child.

If a minor son, living with his father, having been directed by the latter to take his gun with him to the cornfield and to shoot crows there when he had spare time, and promised ten cents apiece for all he should kill, instead of remaining in such cornfield goes off his father's premises hunting other game, and, when several miles

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away, by his negligence in handling his gun injures another person, the father is not liable therefor, because the son was not at the time of the accident in his father's employ or in any sense his servant for such purpose.

APPEAL from a judgment of the circuit court for Waupaca county: CHAS. M. WEBB, Circuit Judge. *Reversed.*

Action for personal injury alleged to have been inflicted upon plaintiff by a servant of defendant. William Fisher, a son of defendant, about sixteen years old, with a boy by the name of Bert Seeber, on or about the 19th day of August, 1894, while on a hunting expedition, stopped at the residence of a Mr. Mack, for the purpose of procuring a string with which to tie together some squirrels they had killed. Several persons were sitting on the steps of the porch, and plaintiff was sitting on a barrel at the end of the steps, which positions such persons kept until the happening of the accident hereafter mentioned. The Seeber boy went into the house for the string. The Fisher boy remained outside, and stood leaning on his gun, which stood in front of him, stock down, his hands resting on the muzzle. He was about sixteen feet from plaintiff. In a few moments the Seeber boy returned, and they both prepared to proceed on their hunting expedition. As they did so the Fisher boy picked up his gun by the muzzle, and swung it over his head, for the purpose of resting it on the left shoulder. In making such movement, the gun left his hands, and went over his left shoulder, onto the ground, and was discharged. A shot struck some hard substance, from which it glanced, and struck plaintiff in the eye, causing the injury complained of.

The complaint, by proper allegations, set forth that the Fisher boy was a servant of defendant at the time of the occurrence stated, and was then in pursuit of his employment as such servant; that he handled the gun in a negligent manner, thereby causing the injury to plaintiff; and

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that by reason of the relations existing between defendant and his son, of master and servant, the former was answerable for the negligence of the latter. The jury found for the plaintiff. Defendant's counsel moved the court to set aside the verdict, and for a new trial, which was denied. Judgment was entered on the verdict in plaintiff's favor, and defendant appealed.

For the appellant there was a brief by *Felker, Goldberg & Felker*, and oral argument by *C. W. Felker*.

For the respondent the cause was submitted on the brief of *G. W. Cate*. He contended that the son, having no other employment, was presumptively the servant of his father, the defendant. *Gerhardt v. Swaty*, 57 Wis. 24, 37; *Schaefer v. Osterbuck*, 67 id. 495. By employing him to hunt with a gun the father assumed the risk of his carelessness. *Enos v. Hamilton*, 24 Wis. 658; *Shea v. Sixth Ave. R. Co.* 62 N. Y. 180; *Oliver v. N. P. Transp. Co.* 3 Oreg. 84; Wood, Master & S. § 307.

MARSHALL, J. The master is liable for the negligent acts of his servant within the scope of the latter's employment. If the servant steps aside, however, from his master's business, though but temporarily, to do some act outside the business of his master, the relation of master and servant during such time is suspended; and, whatever the latter does during such time, the consequences are not chargeable to the former. 14 Am. & Eng. Ency. of Law, 809. That sufficiently states the law applicable to this case, and the jury was so substantially instructed by the court. Under such instructions, on the evidence, they found specially that the Fisher boy, on the day of the accident, was employed by defendant to shoot crows, at ten cents apiece, and that he was in defendant's employ under such contract, and acting within the scope of such employment, at the time of the accident. Such finding is challenged as contrary to the law

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and the evidence, which raises the principal question for our consideration.

The evidence tends to show that, on the morning in question, defendant told his son to go into the field and shoot crows, whenever he had spare time, and that defendant would give him ten cents apiece for all he would kill; that on the day previous the two boys arranged to go hunting; that, pursuant to such arrangement, they started out about 12 o'clock, and went from place to place, through the woods, wholly outside defendant's farm, for the purpose of shooting game other than crows; that up to about 4 o'clock in the afternoon they had killed two squirrels, at which time they were about two miles from defendant's house, and in the vicinity of Mack's house. They then agreed to go through a piece of woods back of the latter's house, and from there home. At the suggestion of the Seeber boy, they stopped at Mack's house to get a string to tie the squirrels together. After the string was procured, and as they started to leave, and just before the accident happened, the Fisher boy said: "We must be going, or we will not get many crows. Father offered us ten cents apiece for all the crows we would kill to-day." Such, in substance, is the evidence bearing on the question of the relation between defendant and his son at the time of the accident. We fail to find any evidence tending to show that during the day the boy had been hunting crows in his father's field or elsewhere, under contract with the latter or otherwise, or that he was, at the time of the accident, in his father's employ, hunting, and his servant for such purpose in any sense whatever. The verdict of the jury to the contrary, clearly, is unsupported by the evidence; and the judgment must be reversed, and a new trial granted, for that reason.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded for a new trial.

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HAMACKER and others vs. COMMERCIAL BANK and others.

February 5 — February 23, 1897.

Receiver, accounting by: Payment of taxes: Payment to surety company.

1. A receiver, appointed in an action to have a bank declared insolvent, cannot resist payment of a tax assessed against such bank, which is based on a property statement made by its cashier to the assessor in good faith before its insolvency, because the bank is estopped by such statement, even though it had in fact no property liable to taxation,— the property listed being its own bank stock which ought to have been assessed to the stockholders,— and the receiver is also estopped thereby. He, therefore, should be credited on his accounting with the amount paid on such tax, even though he made it without authority previously obtained
2. A receiver, on whose bond a surety company has become surety, as authorized by ch. 196, Laws of 1893, is entitled to be credited with the amount paid by him to such company for that service, provided the sum be reasonable as limited by ch. 219, Laws of 1895.

APPEALS from an order of the circuit court for Portage county: CHAS. M. WEBB, Circuit Judge. *Affirmed in part; reversed in part.*

This is an action under sec. 3218 *et seq.*, R. S., brought by a creditor to wind up the affairs of the Commercial Bank of Stevens Point, an insolvent state banking corporation. One *Malick* was appointed receiver by consent at the time of the commencement of the action, and took possession of the assets about April 1, 1895. He gave bond as a receiver, signed by the American Surety Company as sole surety. He resigned in August, 1895, and filed his account, and one *Pfiffner* was appointed receiver in his stead. By his account it appeared that *Malick* had paid a personal property tax assessed against the bank for the year 1894, amounting to $1,237.70, and that he had paid $603.38 to the surety company for signing his bond as receiver. These items were objected to by intervening creditors and the second

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receiver, and upon hearing the court disallowed the first of said items, but allowed the second. Thereupon *Malick* appealed from that part of the order disallowing the item paid for taxes, and *Pfiffner* and the intervening creditors appealed from that part of the order allowing the item paid the surety company for signing the bond.

For the first receiver, *Malick*, on his appeal, there was a brief by *Raymond, Lamoreux & Park*, and oral argument by *B. B. Park*. They argued, *inter alia*, that the assessment was made long before the bank became insolvent. The records showed a legal tax, legally imposed, and it was the duty of the receiver to pay. He should be protected in so doing. The bank was estopped by its cashier's statement of personal property from contesting the validity of the tax, and the receiver stands in no better position. 25 Am. & Eng. Ency. of Law, 209, 451; *Lake Co. v. Sulphur Bank*, 66 Cal. 17; *People ex rel. Johnson v. Atkinson*, 103 Ill. 45; *Sage v. Burlingame*, 74 Mich. 120; *Faribault Water Works Co. v. Rice Co.* 44 Minn. 12. The stockholders are also estopped. *People v. S. & C. R. Co.* 49 Cal. 414; *Ives v. North Canaan*, 33 Conn. 402. The tax was a preferred claim, and the receiver had a right to pay it by virtue of his appointment, without any further order. *Marathon Co. v. Barnes*, 86 Wis. 667. The receiver was entitled to be allowed the amount paid to the surety company. The authority for it to furnish the bond is given by ch. 196, Laws of 1893, and the payment to it of a reasonable sum for so doing is authorized by ch. 219, Laws of 1895. The amount paid was reasonable.

For the second receiver, the stockholders and the creditors, there was a brief by *Brennan, Synon & Frost*, and oral argument by *John H. Brennan*. They contended that the tax was void on its face, being upon the bank stock, which the law requires to be taxed to the owners. The receiver had no right to pay claims without an order of the court. 20 Am. & Eng. Ency. of Law, 113, 117, 120; *John-*

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son v. Gunter, 6 Bush (Ky.), 534; *Ricks v. Broyles*, 78 Ga. 610; High, Receivers (3d ed.), § 798; *Hooper v. Winston*, 24 Ill. 353; Circuit Court Rule XXVIII, sec. 2. The property in his hands was *in custodia legis*, and the officer demanding payment of the tax could not have levied thereon. *In re Tyler*, 149 U. S. 164; *Ex parte Chamberlain*, 55 Fed. Rep. 704; *De Winton v. Mayor of Brecon*, 28 Beav. 200. The bank was not estopped by the statement made by its cashier, that act not being within the scope of his authority. 17 Am. & Eng. Ency. of Law, 157; *Alexander v. Cauldwell*, 83 N. Y. 480; *Allegheny Co. Workhouse v. Moore*, 95 Pa. St. 408; *Hanf v. N. W. M. A. Asso.* 76 Wis. 450. There was no estoppel unless the city and its officers were induced to do or omit some act by such statement. 7 Am. & Eng. Ency. of Law, 16–18; *Warder v. Baldwin*, 51 Wis. 450; *Gove v. White*, 20 id. 425. The payment was made before the action was properly begun by bringing in the stockholders. *Adler v. Milwaukee Patent Brick Mfg. Co.* 13 Wis. 57; *Coleman v. White*, 14 id. 700; *Carpenter v. Marine Bank*, id. 705, note. Advice of counsel did not justify his action. *Smith v. Cook*, 39 Ga. 191; *Capet v. Parker*, 3 Sandf. 662; *Myers v. State*, 46 Ohio St. 473. The payment to the surety company was within the prohibition of Circuit Court Rule XXVIII, sec. 2, and that rule is by secs. 3219, 3224, R. S., extended to receivers appointed in actions like this. The bond was approved by the county judge, who had no power to approve it. Under sec. 2815, R. S., as amended by subch. 24, ch. 194, Laws of 1879, only the circuit *court* could make the appointment or approve the bond. *Newman v. Hammond*, 46 Ind. 119. The court was never called upon to decide whether the sum paid was reasonable.

WINSLOW, J. 1. The city taxes (if enforceable) were a preferred claim against the estate, but by statute they should be paid only pursuant to order of the court contained in the

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final judgment in the action. R. S. secs. 3225–3245. Though the payment was unauthorized when made, still if the fact appeared that the claim was a valid one against the estate, and one that must necessarily be allowed and paid, the court will not disallow the payment because made without authority previously obtained. *Brown v. Hazlehurst*, 54 Md. 26; *Thompson v. Phenix Ins. Co.* 136 U. S. 287; High, Receivers (3d ed.), § 798. The question as to the allowance of this item, therefore, becomes simply an inquiry as to whether it appeared that the charge was one that must at some time necessarily be paid out of the estate. It is not claimed but that there will be ample funds to pay all preferred claims, but it is said that the tax was illegal and void, and could not be enforced against the estate, and hence that the receiver should not have paid it. As to the legality of the tax, the facts were that the bank had no personal property subject to taxation. Its capital stock was $60,000; it had no surplus or real estate. The stockholders should have been taxed on the value of their shares. Laws of 1866, ch. 102; S. & B. Ann. Stats. p. 1218; *Second Ward Sav. Bank v. Milwaukee*, 94 Wis. 587. But this was not done. For years, in the city of Stevens Point, the method of bank taxation has been as follows: The whole amount of capital stock and surplus, if any, were added together. From this sum were deducted the United States bonds and the bank building, and the amount remaining was divided by three, and the quotient was entered on the assessment roll as the taxable property of the bank. In the present instance the bank had no surplus, bonds, or real estate. The cashier made a property statement to the assessor in which he listed for taxation personal property not exempt, $20,000. The assessor put on his roll two items, as follows:

Value of bank stock..... $20,000.
Total value of all personal property..... $20,000.

Upon the tax roll the bank was assessed directly as the

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owner of personal property valued at $20,000, and the various items of taxes were carried out. Although this was an improper mode of taxation, we do not perceive how the bank could escape from paying the tax which was based upon a personal property return made by its own cashier. In such cases the principle of estoppel has been frequently applied, and certainly with justice. 25 Am. & Eng. Ency. of Law, 209; *Ives v. North Canaan*, 33 Conn. 402; *Republic L. Ins. Co. v. Pollak*, 75 Ill. 293; *People v. S. & C. R. Co.* 49 Cal. 414. If the bank could not question or resist the tax, no ground is perceived upon which the receiver could resist it. There is no evidence nor finding that the bank was insolvent in 1894, when the statement was made and the tax levied, nor is there anything to show that the return of the cashier was not made in entire good faith. Certainly, where there are no elements of fraud upon creditors in the transaction, the receiver stands in no better plight than the corporation itself. *McLaren v. First Nat. Bank*, 76 Wis. 259; High, Receivers (3d ed.), §§ 318–320.

2. We think the court was right in allowing the charge for obtaining the signature of the American Surety Company as surety on the bond. The execution of the bond by such a company as surety is authorized by ch. 196, Laws of 1893, and a reasonable charge therefor, not exceeding two per cent. per annum, is expressly authorized by ch. 219, Laws of 1895. We have nothing to do with the policy of the law. It was certainly competent for the legislature to make such a law, and we are to administer it in accordance with its plain intent. In this case the court required a bond of $80,000, with sufficient sureties to be approved by the county judge of Portage county. The bond was executed by *Malick* as principal, and by the surety company as surety, and approved by the designated officer. The amount allowed is apparently within the percentage allowed by the statute. Although the court does not in its order say that the sum

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allowed is a reasonable one, the very fact of the allowance of the sum is, in effect, a declaration that it is reasonable. It follows from these views that the part of the order appealed from disallowing the item of $1,237.70 paid for taxes must be reversed, and that part allowing the item of $603.38 paid the surety company must be affirmed, and the cause remanded for further proceedings according to law. The costs are to be taxed and paid out of the estate.

By the Court.— It is so ordered.

CLIVER, Respondent, vs. HEIL, Appellant.

February 5 — February 23, 1897.

Contract, time for payment: Parol evidence to vary: Settlement, proof of.

1. Upon a written contract for the performance of services, which fixes no time for payment therefor, it is due on demand; and if there is nothing on the face of the contract to indicate that it does not embody the entire agreement between the parties, parol evidence is not admissible on the part of the defendant in an action on the contract to prove a contemporaneous agreement postponing payment.
2. In an action for such services, an order given by the defendant to the plaintiff on a third person for the amount due, if not paid, is not admissible as evidence of a settlement.

APPEAL from a judgment of the circuit court for Wood county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

This was an action to enforce a claim for services performed upon logs and timber, under the lien law. The amount of the claim was $291.71. The defense was that, at the time the action was commenced, the sum claimed was not due and payable, but the amount of plaintiff's claim was conceded. Services were rendered under a written contract between the parties, which did not specify any time of pay-

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ment; and the defendant insisted that, by a parol agreement between the parties, the amount claimed was not to become due until on or about May 1, 1896.

The defendant offered to prove: (1) That the parties had agreed as to just what their contract was, and had some talk as to the time of payment, and that they agreed to leave that out of the written contract. This evidence was excluded, on the ground that it tended to vary the terms of the written contract. (2) That, at the time the contract was made, it was verbally agreed between them that the plaintiff was not to receive his pay until about May 1, 1896, when the defendant would receive his pay for the timber in question of the Upham Manufacturing Company; but as he did not have his contract with him so as to ascertain when it would be payable, the contract in question was drawn up without any specification on that subject, and with the verbal agreement that the plaintiff would wait for payment until the defendant should receive his money under his contract with the manufacturing company. This evidence was objected to, and excluded, as tending to vary the terms of the written contract by parol evidence. (3) That it appeared that a settlement was made between the plaintiff and defendant February 21, 1896, by which the sum claimed was found due, and the defendant gave the plaintiff an order, in general terms, bearing the date last aforesaid, upon the Upham Manufacturing Company, to pay *Henry Cliver* or bearer the amount so found due, and to charge to the account of *Louis Heil*. This order was brought into court and surrendered, plaintiff not having received anything thereon; and the defendant offered to prove that the plaintiff asked him to give the order, and, as a special favor, not to date it April 1, as he was hard up, and that possibly he might be able to get something out of it before that date; that the defendant at first refused to give said order, but, upon being pressed by plaintiff to have something to show

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for his winter's work, he was induced to give the order in question. This evidence was objected to and excluded, for the reasons already stated.

The court found that the demand was due at the time of the commencement of the action, and gave judgment accordingly, from which the defendant appealed.

For the appellant the case was submitted on the brief of *John F. Cole.* He contended that it was competent, when there was an uncertainty in a written contract, to show by parol the construction put upon it by the parties. *Lyman v. Babcock*, 40 Wis. 503, and cases cited; *Nilson v. Morse*, 52 id. 240; *Lynch v. Curfman*, 68 N. W. Rep. 7; *Boles v. Welch*, 94 Wis. 189. It was competent to show a contemporaneous agreement as to manner or time of payment. *Racine Co. Bank v. Keep*, 13 Wis. 209; *Jones v. Keyes*, 16 id. 562; *Peterson v. Johnson*, 22 id. 21; *Sivers v. Sivers*, 97 Cal. 518; *Case v. Phœnix Bridge Co.* 134 N. Y. 78. The order was competent to show a modification of the written agreement. *Ballston Spa Bank v. Marine Bank*, 16 Wis. 120, 136; *Brown v. Everhard*, 52 id. 205; *Lynch v. Henry*, 75 id. 631.

For the respondent there was a brief by *W. A. & E. C. Pors*, and oral argument by *E. C. Pors.*

Pinney, J. There was nothing on the face of the contract upon which the action was brought to indicate or even suggest that it did not embody the entire agreement between the parties. No time of payment for the work the plaintiff was to perform was named in the contract. By a well-established rule of law, payment in such case was to be made on demand. The parol evidence offered at the trial was to prove a contemporaneous parol agreement as to the time of payment,— that payment was not to be made until on or about May 1, 1896. This evidence, if admitted, would have materially varied the construction of the written contract, although it would not have expressly contradicted its terms.

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It would have the effect to add a provision to the contract that it did not contain. The evidence was clearly inadmissible. *Thompson v. Ketcham*, 8 Johns. 190; *Warren v. Wheeler*, 8 Met. 97. Where a contract has been reduced to writing, which purports to contain the whole contract, and it is not apparent from the writing itself that anything is left out, to be supplied by extrinsic evidence, parol evidence to vary or add to its terms is not admissible. *Hei v. Heller*, 53 Wis. 415; *Case v. Phœnix Bridge Co.* 134 N. Y. 78. There was no defense pleaded of a subsequent agreement to extend the time of payment. The effect of the order was to show that the sum named in it was due to the plaintiff, and to request the Upham Manufacturing Company, to which it was directed, to pay it; but the order was not paid, and was produced and surrendered at the trial. The evidence offered was properly excluded, and hence there was no error.

By the Court.— The judgment of the circuit court is affirmed.

DONOHUE, Administrator, Respondent, vs. TOWN OF WARREN, Appellant.

February 5 — February 23, 1897.

Highway: Town liability for defect.

1. Although the person suing for an injury caused by a defect in a highway, such as a dangerous gully or ditch extending across it, was not actually thrown out and injured until his horses had become frightened on passing through it and had been running for some distance therefrom, yet, if such defect was the cause of the horses running away, it may well be held to have been the proximate cause of the injury.
2. A notice of injury and a complaint therefor which designate the place where the accident happened as being "in the highway running between sections three and four in the town of W. at a point about four hundred feet north of the southwest corner of the northwest quarter of section three," are sufficient in that respect, if the defect causing the accident was so near to the point designated as not to cause any material variance.

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Donohue vs. Town of Warren.

APPEAL from a judgment of the circuit court for St. Croix county: E. B. BUNDY, Circuit Judge. *Affirmed.*

This action was brought by the plaintiff's intestate to recover damages which he sustained by reason of defects in a highway of the defendant town. The original plaintiff has died since the action was tried. At the time of the accident the decedent was riding with one Joseph Allyn, in a buggy, drawn by a span of horses driven by Allyn. The time was evening, and it was dark. They were driving at a slow trot, when suddenly the right wheel dropped into a ditch, and Allyn was thrown out. Allyn lost the reins. The team became excited and started to run. A little further on, the left wheel dropped into a ditch, and the decedent was thrown out, and his arm was broken. The team went on and ran away. The parties to the accident were strangers to that road. The night was dark, and they could not, with entire certainty, identify the precise place of the accident. It is described, both in the notice to the supervisors and in the complaint, as being "in the highway running between sections three (3) and four (4) in the town of *Warren*," and "at a point about four hundred feet north of the southwest corner of the northwest quarter of section three (3) of said town of *Warren*." Near the point designated was a large gully or ditch extending entirely across the highway, found by the jury to have been a foot and a half to two feet wide and a foot to a foot and a half deep, and to have been there since the previous fall. The testimony tended to show that the accident happened at this point. There was a special verdict and judgment for the plaintiff, from which the defendant appeals.

For the appellant there was a brief by *John W. Bashford* and *S. N. Hawkins*, attorneys, and a supplemental brief by *R. M. Bashford*, of counsel, and oral argument by *J. W. Bashford* and *R. M. Bashford*. Among other things, they argued that the notice and complaint are so indefinite as not

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to fix the place of the accident, nor was the place definitely shown. *Weber v. Greenfield*, 74 Wis. 234; *Sowle v. Tomah*, 81 id. 349; *Hiner v. Fond du Lac*, 71 id. 74, 78; *Steltz v. Wausau*, 88 id. 618; *Laird v. Otsego*, 90 id. 25. The team was running away and uncontrollable when plaintiff was thrown out and injured, and consequently the town was not liable. *Jackson v. Belleview*, 30 Wis. 250, 257; *Bishop v. Belle City St. R. Co.* 92 id. 139, 143; *Houfe v. Fulton*, 29 id. 296, 306; *Roberts v. Wis. Tel. Co.* 77 id. 589; *Loberg v. Amherst*, 87 id. 634.

W. F. McNally, for the respondent.

NEWMAN, J. The appellant's brief contains specifications of twenty-two errors claimed. Most are in the nature of criticisms of rulings of the trial court in the admission and exclusion of evidence and of the instructions given. None of the objections urged seem to be of controlling importance, or to affect the general fairness of the trial, and do not require examination in detail. On the argument two principal objections only were discussed. And they seem to cover all that is important in the case. They are: (1) "The place where the accident happened was not definitely shown, and the question was not fairly submitted;" and (2) "the team was running away when the plaintiff was thrown out and injured, and the town is not, therefore, liable." If by "the place where the accident happened" is meant only the place where the plaintiff was thrown from the buggy and injured, it is of little importance. The important question is if the defect which caused the accident was in the highway, and so near to the point designated in the notice to the supervisors and in the complaint as not to be in material variance from it. There was, indeed, abundant evidence to establish that there was a defect in the highway, very near to the designated point, where Allyn was thrown out, and where the team started to run, sufficient to have caused the accident, and sufficient to support the finding of the jury that

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that was its cause. And certainly, if the defect in the highway was the cause of the running away of the team, it may well be held to be the proximate cause of the plaintiff's injuries; for, while the town is not required to make its highways safe for teams which are in the condition of fright, and out of the control of their drivers, they are, nevertheless, liable for such damages as are the proximate consequence of a runaway which is caused by defects in the highway. *Kelley v. Fond du Lac*, 31 Wis. 179. It would make no difference that the injuries to the plaintiff were received at some distance from the place of the defect which was the cause of the runaway. No material error is found in the case.

By the Court.—The judgment of the circuit court is affirmed.

Town of Cady, Respondent, vs. Bailey, Appellant.

February 5 — February 23, 1897.

Towns, action by: Pleading: Settlement.

1. A complaint, in an action by a town against its former treasurer, which alleges that the defendant was appointed treasurer to fill a vacancy and qualified by giving the statutory bond, setting out the conditions of the bond and the facts constituting a breach thereof, and that the action was duly authorized by the town board of supervisors, *held* to be one on his official bond, and not on his personal liability as treasurer, though his sureties are not made parties.
2. Though sec. 776, R. S., gives to electors of towns power to direct the institution of actions for such towns, yet sec. 819, R. S., is mandatory in requiring town supervisors to prosecute all breaches of official bonds, and a vote of the electors is not necessary to authorize such an action.
3. A settlement between a public corporation, such as a town, and its treasurer respecting the public moneys which came to his hands, although made by the supervisors and ratified by the electors, is

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not conclusive upon the town, but if such officer, by mistake or otherwise, wrongfully retains public money in his hands, he may be proceeded against therefor at any time on discovery of the facts within the statutory period of limitation.

APPEAL from an order of the circuit court for St. Croix county: E. B. BUNDY, Circuit Judge. *Affirmed.*

It is alleged in the complaint by appropriate allegations that plaintiff, during all the times mentioned therein, was a duly-organized town, under the laws of this state; that on the 31st day of June, 1882, there existed a vacancy in the office of town treasurer of said town, caused by the death of the duly elected and qualified treasurer; that such vacancy was duly filled on that day, in the manner provided by statute, by the appointment of defendant as treasurer of said town, and his qualification for the office by giving the proper bond, which was duly approved and placed on file; that said bond was executed and sealed, and contained all the conditions provided by statute in such cases, including the condition that defendant should truly account for and pay over all the money, according to law, which should come into his hands as such treasurer; that at the end of his term of office he produced a statement of his receipts and disbursements, showing a balance on hand of $591.60; that in truth and in fact the balance of moneys in his hands belonging to such town was $620.02; that by inadvertence and mistake of the town, caused by the conduct of defendant, his account was adjusted as claimed by him, by reason whereof he retained in his hands the sum of $28.42. By reference to an exhibit referred to in the complaint, and attached thereto and made a part thereof, such complaint shows by items the errors committed by the town treasurer, which resulted in his retaining in his hands the said sum of $28.42. The complaint further shows that prior to the commencement of this action, and on the 12th day of November, 1895, the then town treasurer of the town, he having been previously authorized

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thereunto, duly demanded of the defendant payment of said sum of $28.42, and at the time of making such demand served upon the defendant an itemized statement, showing the particular items composing such sum of $28.42, which he had failed to account for and pay over as aforesaid, and called his particular attention to such items; that a sufficient time elapsed thereafter, before the commencement of this action, to enable the defendant to examine the accounts as plaintiff claimed the same to exist, and as shown by a statement served on the defendant at the time of making the aforesaid demand, and that defendant wholly neglected and refused to comply with such demand. It is further alleged that the commencement of this action was duly authorized by the town board of said town. The complaint further sets forth similar facts to constitute a cause of action for a balance on account of money alleged to have been retained by defendant for each of the six succeeding years, being from 1884 to 1889, inclusive. Judgment was demanded for the seven several sums, aggregating in all $522.21, with interest on each sum from the time it was alleged defendant wrongfully failed to account for and pay over the same.

Defendant demurred generally on several grounds, among which were that the complaint does not state facts sufficient to constitute a cause of action, and that it was not brought within the time limited by law; and also demurred specially to the first cause of action on the two grounds particularly mentioned. The demurrers were overruled, and defendant appealed.

For the appellant there was a brief by *Humphrey & Arnquist* and *W. F. McNally*, and oral argument by *Mr. McNally*. They argued that the complaint did not state a cause of action on the treasurer's bond, but if so intended, the action was barred by statute. *Sheldon v. Rockwell*, 9 Wis. 166, 181; *Sable v. Maloney*, 48 Wis. 321; *Rogers v. Van Nortwick*, 87 Wis. 414; Story, Eq. Jur. § 1520; Wood, Lim-

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itations, 117; *Spalding v. Farwell*, 70 Me. 17; *Hunt v. Ellison*, 32 Ala. 173; *Kerby v. Jacobs*, 13 B. Mon. 435; *Wilson v. Anthony*, 19 Ark. 16. The complaint fails to show that the action was authorized by the town electors, as sec. 776, R. S., requires. *State ex rel. Manitowoc v. County Clerk of Manitowoc Co.* 59 Wis. 15; *State ex rel. Baraboo v. Sauk Co.* 70 id. 490; *State ex rel. Spring Lake v. Pierce Co.* 71 id. 322; *Fox Lake v. Fox Lake*, 62 id. 486, 489.

For the respondent the cause was submitted on the brief of *S. J. Bradford* and *Baker & Helms*.

MARSHALL, J. The several alleged causes of action are substantially alike, except that each is for a balance for a particular year. If the first cause is well stated, all are, and the demurrers were properly overruled.

The first claim by defendant's counsel is that the action is not on the official bonds of the defendant, but is on his personal liability as treasurer. We are unable to concur in that view. The defendant was liable independent of the bonds, and liable upon the bonds as well. It was proper to bring the action upon either liability and upon the bonds without joining the bondsmen. The complaint contains all the necessary allegations to show the pleader's intent to declare for a breach of the official bond in respect to each cause of action. The conditions of the bonds are set out, and the facts pleaded constituting the breach relied upon as to each. If the causes of action were independent of the bonds, it would have been sufficient to allege generally that defendant duly qualified and entered upon the duties of his office, without setting forth particularly the conditions of the bonds. We reach the conclusion without difficulty that the several causes of action are upon official bonds given by the defendant, and that they are all well pleaded. Such bonds being instruments under seal, obviously the statute of limitations had not run at the time of the commencement of the action.

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Compliance with sec. 776, R. S., respecting the necessity for a vote of the electors of the town at the annual town meeting, to authorize the action, was not necessary. That section provides that the qualified electors of each town shall have power at any town meeting to direct the institution and defense of all actions in which the town is a party or interested; but sec. 819, R. S., provides that "the supervisors of each town shall . . . see that . . . all breaches of official bonds to the damage of the town . . . are prosecuted." The authority of the supervisors to institute and prosecute actions in the cases specially mentioned in sec. 819 is mandatory, and does not depend upon a vote of the electors of the town, under sec. 776. *Fox Lake v. Fox Lake*, 62 Wis. 486; *State ex rel. Manitowoc v. County Clerk of Manitowoc Co.* 59 Wis. 15; *Woodman v. Bohan*, 91 Wis. 36.

The point is raised that presumably the settlement made between the defendant and the town board for each year was examined and ratified by the people at the succeeding town meeting, pursuant to sec. 822, R. S., and that such settlement and ratification are binding on the town. The law applicable to settlements between private parties does not apply to settlements between a public corporation and its officers, respecting the handling by the latter of public money. Notwithstanding such settlements, if such officers, by a mistake or otherwise, wrongfully retain public money in their hands, they may be proceeded against therefor at any time thereafter, upon discovery of the facts, within the period of the statute of limitations. Throop, Pub. Off. §§ 280–283; *Otsego Lake v. Kirsten*, 72 Mich. 1; *Palo Alto Co. v. Burlingame*, 71 Iowa, 201; *Boardman v. Flagg*, 70 Mich. 372; *Sexton v. Richland Co.* 27 Wis. 349.

The result of the foregoing is that the trial court properly overruled defendant's demurrers.

By the Court.— The order of the circuit court is affirmed, and the cause remanded for further proceedings according to law.

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BURKHARDT and another, Appellants, vs. ELGEE, Respondent.

February 5 — February 23, 1897.

Appeal, dismissal of for insufficient certificate of judge.

An appeal in a case involving less than one hundred dollars will be dismissed, unless the judge's certificate as to questions of law to be decided (required by ch. 215, Laws of 1895) states the ultimate facts on which the particular questions of law are raised, so that the supreme court can determine the same without reference to the record.

APPEAL from a judgment of the circuit court for St. Croix county: E. B. BUNDY, Circuit Judge. *Appeal dismissed.*

The case involved rights of fishery in Willow river, and is sufficiently stated in the opinion.

For the appellants the cause was submitted on the brief of *Baker & Helms.*

For the respondent there was a brief by *James A. Frear* and *J. W. Bashford*, and oral argument by *Mr. Bashford.*

CASSODAY, C. J. The amount involved in this case, exclusive of costs, is less than $100. A former appeal from the judgment of the trial court was dismissed for want of a certificate as required by ch. 215, Laws of 1895. 93 Wis. 29. Since that decision this court has repeatedly held, in effect, that such appeal will be dismissed unless the judge's certificate states the ultimate facts on which the particular questions of law are raised, so that this court may determine the same from such statement alone, without reference to the record. *Independence Creamery Co. v. Lockway*, 94 Wis. 184; *Leppla v. Reed*, 94 Wis. 307. As indicated in these cases and the act in question, the cause is to be certified only when it "necessarily involves the decision of some question or point of *law* of such doubt and difficulty as to require a decision" of this court; "and in *all such cases*

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the question or questions so certified shall be briefly and clearly stated," and "no other question shall be considered or decided." It is only questions or points of law which are to be so decided; and, in order to decide the same, the facts in the case upon which they, respectively, depend must be clearly and briefly stated.

The certificate in the case at bar does not comply with these decisions nor the statute. It contains seventeen different questions to be answered. Several of these questions certified are based upon the record in the case. Several of them are questions of fact to be determined by this court from the record. The action is for trespass upon lands of which the plaintiffs were alleged to be the owners and in possession. This was denied, and the court found that Mrs. Burke was in the actual possession, instead of the plaintiffs. One of the questions certified is as to whether the evidence sustains such finding. Instead of stating each question or point of law involved, and the facts upon which it depends, a large number of the questions certified are based upon an assumption of facts, or upon an abstract statement of facts which may or may not be in the case, depending upon the conclusions which might be reached by an examination of the whole record. *State v. Hickok*, 90 Wis. 161, 166. The act in question was designed to save costs to litigants and labor to attorneys and to this court in cases involving such small amounts, by enabling this court to decide doubtful and difficult questions of law involved upon such certificate. To allow such certificate to be used as a bill of discovery, as here attempted, would not only nullify the statute, but greatly increase the labors of this court and attorneys in such cases, and hence increase the costs to litigants.

By the Court.— The appeal is dismissed.

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MAGEE, Respondent, vs. THE MISSISSIPPI RIVER LOGGING COMPANY, Appellant.

February 5 — February 23, 1897.

Appeal on questions of fact.

Where the questions raised on appeal are purely questions of fact, and there is evidence to sustain the findings of the court and no preponderance of evidence against them, the judgment will be affirmed.

APPEAL from a judgment of the circuit court for Pepin county: E. B. BUNDY, Circuit Judge. *Affirmed.*

The case is sufficiently stated in the opinion.

For the appellant there was a brief by *Jenkins & Jenkins*, and oral argument by *W. W. Jenkins*.

For the respondent there was a brief by *C. M. Hilliard* and *S. G. Gilman*, and oral argument by *S. G. Gilman*.

WINSLOW, J. The questions raised on this appeal are purely questions of fact. The plaintiff claims a balance of about $700 due him from the defendant upon a logging contract. It appeared that the plaintiff and one Gilmore had made a joint contract for logging certain lands with Laird, Norton & Co. several years before the contract in suit, and that the contract was made on behalf of Laird, Norton & Co. by the defendant, and all accounts were kept on the defendant's books, and payments made by defendant. After making this previous contract, plaintiff and Gilmore separated their interests under it, and each logged separate parts of the lands covered by the contract. On this contract Gilmore quit work $700 in debt to Laird, Norton & Co., and the defendant claims that the plaintiff is liable for this amount as Gilmore's partner, and also that *Magee* agreed that he would pay Gilmore's deficit in consideration of an increase of fifty cents per thousand in his pay. *Magee* de-

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nies these claims, and alleges that he and Gilmore completely separated their interests, with the consent of the defendant, and practically made separate and distinct contracts, and that he never agreed to pay Gilmore's shortage.

These were questions of fact, and the court (jury being waived) made findings in accordance with the plaintiff's contention. There was evidence on which to base these findings, and it cannot be said that the preponderance of evidence was clearly against them.

By the Court.— Judgment affirmed.

CATURA, Respondent, vs. KLEINER, imp., Appellant.

February 6 — February 23, 1897.

Appeal, findings sustained.

Upon appeal, the findings of the trial court are not to be disturbed, unless they are clearly against the weight of the evidence.

APPEAL from a judgment of the circuit court for Pepin county: E. B. BUNDY, Circuit Judge. *Affirmed.*

This is an action to foreclose a mortgage executed by the defendant Hewitt to the plaintiff, to secure the purchase money of the land. *Rudolph Kleiner* was made a defendant, as one claiming some interest in the premises, which was subsequent and subordinate to the plaintiff's mortgage. *Kleiner* defended, and asserted that his mortgage was the prior and paramount lien; that he took his mortgage in good faith, and without notice of plaintiff's mortgage. The mortgaged premises were conveyed by the plaintiff to Hewitt, and the mortgage to secure the purchase money taken, August 21, 1893. Only a small part of the purchase money was paid down. On the next day, after its execution and before it had been filed for record, Hewitt borrowed money from

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Kleiner, and gave him a mortgage upon the same land. This mortgage was recorded before the plaintiff's mortgage. It was claimed by *Kleiner* that, at the time he took his mortgage and recorded it, he was ignorant of the existence of plaintiff's mortgage, and was a mortgagee in good faith and without notice of the prior mortgage. On the other hand, the plaintiff claimed that he had, if not actual notice, information sufficient to put him upon inquiry, and so was not a mortgagee *in good faith*. This was the issue which was tried.

On this issue, Hewitt testified, in effect, that shortly before, at Eau Claire, he had told *Kleiner* that he was about to buy this land from the plaintiff; that he was going to pay $200 down, and give a mortgage back to secure the balance of the purchase money; and that he should want to borrow money of him. *Kleiner* replied, in effect, that he did not care, if his mortgage was on record first. That at that time he had arranged with *Kleiner* to come to Durand, to make the loan and take the mortgage. A witness, Mike Dryer, testified that he told *Kleiner* that he was "going to give Hewitt $200 to sign off his equity in the piece of land on which he (*Kleiner*) had a mortgage. I told *Kleiner* that I was going to pay the $200 to *Mr. Catura*, as part of the purchase price of the eighty-acre tract of land. I couldn't say for sure whether I stated to him that Mr. Hewitt was to give *Mr. Catura* a mortgage back for the balance of the purchase price, but I think I did. I told *Kleiner*, that morning, to go and see the records, and, if the records were clear, probably it would be all right to take a mortgage from Hewitt. I think I told him to go and see if *Mr. Catura* had filed his mortgage for record. I can't say for sure, but I think I did." This testimony relates to the time of the taking of this mortgage by *Kleiner*, at Durand, the county seat. These conversations *Kleiner* denied.

On all the evidence, the trial court found the issue in favor of the plaintiff. He found that there was a corrupt scheme

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between Hewitt and Dryer for defrauding the plaintiff, *Catura;* and that, while *Kleiner* had no part in that scheme, he yet had such knowledge of the parties and the circumstances as should have been notice to him of the existence of plaintiff's mortgage, sufficient to have put him on inquiry. From a judgment in the plaintiff's favor, the defendant *Kleiner* appeals.

For the appellant there was a brief by *Doolittle & Shoemaker*, and oral argument by *L. A. Doolittle.*

For the respondent the case was submitted on the brief of *William E. Plummer.*

NEWMAN, J. No reason is perceived why this appeal is not governed by the established rule that the findings of the trial court are not to be disturbed unless they are clearly against the preponderance of the testimony. The trial judge has many incidental aids to the understanding and appreciation of the testimony, which this court lacks. He sees the witnesses, observes their manner in giving their testimony, can judge of their intelligence, and receives some reliable impressions from their appearance and conduct of their singleness and veracity, or want of it, which assists him in his judgment of the credit due to their statements. This court receives no such aid in its study of the testimony from the printed page. So, great reliance is, of necessity, placed upon the judgment of the trial court on contested questions of fact. There is abundant testimony, if believed, to support the findings of the trial court. No reason is apparent to this court why the trial court might not, without violation of any legal principle, believe the testimony which supports the findings.

By the Court.— The judgment of the circuit court is affirmed.

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MUELLER, Appellant, vs. WIESE, Respondent.

February 6 — February 23, 1897.

Married women, contracts by.

1. In the absence of an enabling act, the contracts of a married woman are cognizable only in equity. Except as affected by the so-called "married women's act" (secs. 2342–2345, R. S.), such contracts cannot be enforced at law.
2. By the provisions of that statute, only contracts which relate to or are necessary or convenient for the use and enjoyment of a married woman's separate estate, or the carrying on of her separate business, or which relate to her personal services, can be enforced at law. An action at law is not, therefore, maintainable against a married woman on a note signed by her solely as surety for her husband.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

Defendant signed a judgment note as surety for her husband. Judgment was rendered thereon. Thereafter, on affidavits and a verified answer, she moved the court to set the judgment aside, and for leave to defend, which motion was granted. The action was thereafter tried by the court, a jury trial having been waived. The trial judge found, in substance, that the defendant, on the 21st day of August, 1890, executed the note in suit as surety for her husband, John Wiese, now deceased; that the consideration for the note was an antecedent debt of the husband, due and owing when the note was given; that at the time of such execution defendant was the beneficiary named in a benefit certificate of membership in the Northwestern Mutual Relief Association, issued to her husband; that at such time she promised and agreed that, in case of nonpayment of the note during the life of her husband, the proceeds of the insurance certificate should be applied for that purpose, and that plaintiff relied upon such promise, and incurred further obligations

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for the benefit of the husband, not, however, embraced in the note; that defendant had no separate estate, business, or property, other than her interest in such benefit certificate. On such facts the trial court concluded as a matter of law that the defendant was not liable in this action, and ordered judgment accordingly, from which judgment this appeal was taken.

John C. Fehlandt, attorney, and *Burr W. Jones*, of counsel, for the appellant, contended that the wife in signing the note intended to and did charge her separate estate. *Archibald v. Mut. L. Ins. Co.* 38 Wis. 542, 545; *Krouskop v. Shontz*, 51 id. 204, 217; *Messer v. Smyth*, 58 N. H. 298; *Marlow v. Barlow*, 53 Cal. 456; *Wood v. Orford*, 52 id. 412; *Kenworthy v. Sawyer*, 125 Mass. 28; *Houghton v. Milburn*, 54 Wis. 554, 563. She had an interest in the insurance and intended to charge it with this debt. *Nelson v. McDonald*, 80 Wis. 605, 607.

For the respondent there was a brief by *Bashford, O'Connor & Aylward*, and oral argument by *R. M. Bashford.*

Marshall, J. This is an action at law to charge a married woman on a note signed by her solely as surety for her husband. It did not concern her separate property or business. She had no such business, and no separate property except a beneficial interest in a policy of insurance on her husband's life, made her separate property by ch. 376, Laws of 1891. It is not like *Krouskop v. Shontz*, 51 Wis. 204, where the contract pertained to the business of the person sought to be charged. In such a case it was there held that such person, though a married woman, is liable at law whether the contract be written or oral, or part one and part the other. This case is identical with *Kavanagh v. O'Neill*, 53 Wis. 101, where the court distinctly held that a note for the debt of another, signed by a married woman merely as surety or accommodation for such other, cannot

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be enforced against her in an action at law. That is conclusive of the question here raised. The reasons for the rule are clearly shown in *Krouskop v. Shontz*, in an exhaustive opinion by the present chief justice, in which all the adjudications of this court up to that date are collated and commented upon. Such rule may be stated in short thus: In the absence of an enabling act, the contracts of married women are cognizable only in equity. Therefore, except as varied by the married women's act, so called, of this state (secs. 2342–2345, R. S.), such contracts cannot be enforced at law. The scope of such statutes only includes contracts necessary or convenient for the use and enjoyment of a married woman's separate estate, or the carrying on of her separate business, or in relation to her personal services. They have no relation whatever to contracts solely of suretyship for debts of others. *Emerson-Talcott Co. v. Knapp*, 90 Wis. 35. As to such contracts, the rights and remedies of married women are governed by the common law. Whether the defendant can be held liable on the facts in a suit in equity to charge her separate property with the debt is not before us, therefore not decided.

By the Court.— The judgment of the circuit court is affirmed.

MENZ, Respondent, vs. BEEBE and another, Appellants.

February 6 — February 23, 1897.

Actions by feeble-minded persons: Guardian* ad litem: *Joinder of causes of action.

1. At common law, and in the absence of any statute to the contrary, a person who is weak, feeble-minded, and not of sufficient mental capacity to attend to ordinary business transactions and preserve his property rights, may sue in his own name, without a guardian *ad litem*, to set aside an exchange of property fraudulently pro-

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cured from him by the defendant. The mere fact that he, in his complaint, acknowledges himself to be so, does not preclude his suing in his own name, nor is there anything in secs. 2615, 2616, R. S., or secs. 3976–3982, S. & B. Ann. Stats., providing for the appointment of guardians *ad litem* for insane or mentally incompetent persons, to prevent him from doing so.

2. A complaint, in an action to rescind an exchange of lands, which alleges that one of the defendants fraudulently induced the plaintiff to exchange lands in Wisconsin for lands in Tennessee, by taking advantage of his mental incapacity and by making false representations as to the quality of the Tennessee lands and the state of the title, and that said defendant had contracted to convey the Wisconsin lands received by him in exchange to the other defendant, who takes them with knowledge of the facts, and that the latter defendant threatens to sell or incumber the lands so as to prevent the plaintiff from collecting any judgment he may obtain, and prays for a rescission of the trade, a reconveyance of the Wisconsin lands, an injunction against any disposition or incumbering of those lands by the defendants, their attorneys, etc., and for damages,—does not misjoin causes of action, but states only one cause.

APPEALS from orders of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

The complaint alleges, in effect, that October 5, 1893, the plaintiff was the owner in fee of a farm of 120 acres, described, in Sun Prairie, and certain parts of lots in the village of Marshall, and certain personal property of the value of about $1,400; that at the same time the defendant *Beebe* claimed to be the owner in fee of two tracts of land, described, in Tennessee, containing together 320 acres; that October 5, 1893, the plaintiff was, and still is, of a weak and feeble mind, and not of sufficient mental capacity to attend to ordinary business transactions, or to protect and preserve his property rights; that *Beebe* knew of such incapacity and inexperience in business matters, and that he could be easily imposed upon; that *Beebe* was then a practicing physician in Marshall, with a large practice, and well experienced in conducting business affairs, and had gained the confidence of

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the plaintiff, who was disposed to rely, and did greatly rely, upon his counsel, advice, direction, and suggestions; that *Beebe*, taking advantage of the plaintiff's weak and feeble mental condition and of his confidence in him, for the purpose of wrongfully and fraudulently obtaining from the plaintiff title to his said real and personal property, solicited and exchanged the plaintiff's said farm and real and personal property for said 320 acres of land in Tennessee; that on said day *Beebe* did falsely and fraudulently represent to the plaintiff that the said land in Tennessee was first-rate, heavily timbered land, covered with a growth of the best kind of timber, and was worth at the least $15 per acre; that like lands could not be bought for any less; that *Beebe* had a complete title to said land in fee simple,— when in truth and in fact *Beebe* well knew that such representations were wholly and entirely false, and that said Tennessee land was a poor grade of land, with a light growth of timber thereon, and was not worth to exceed $2 per acre, as *Beebe* then well knew; that like land could be bought at a price not exceeding $2 per acre; that *Beebe* did not have good and complete title to said land in fee simple, as he well knew; that the title to thirty-three acres thereof was not in *Beebe*, and had wholly failed, and the plaintiff's possession thereof defeated; that the title to 120 other acres thereof is claimed by another party, and is now in litigation; that the plaintiff relied upon such false and fraudulent representations of *Beebe*, and believed the same to be true, and was thereby induced to convey, deed, and transfer all of his said real and personal property to *Beebe*, October 5, 1893; that such conveyance was by a warranty deed, duly recorded October 5, 1893; that *Beebe's* deed to the plaintiff was defective, in that it was not properly acknowledged by his wife, as required by the laws of Tennessee; that the plaintiff has offered to reconvey to *Beebe* the Tennessee lands, and has duly demanded of *Beebe* a rescission of the trade, and a reconveyance to

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him of all the property which *Beebe* so got from him, but which *Beebe* has refused; that the value of the real estate so conveyed to *Beebe* is $6,000, and the value of the personal property so transferred to him was then $1,400; that the value of the Tennessee lands was and is not to exceed $640; that the plaintiff has been damaged by reason of the premises to the amount of over $6,000; that the plaintiff now brings into court a deed duly executed by him, conveying back to *Beebe* the Tennessee lands, and tenders the same to *Beebe* upon his reconveying to the plaintiff the lands received by him from the plaintiff, and his paying to the plaintiff the amount of damages he has suffered; that *Beebe* sold the lands so conveyed to him by the plaintiff to the defendant *Bohn*, October 8, 1894, by a land contract recorded January 10, 1896, for $6,000, of which $500 was to be paid down, and the balance within fifteen years, with six per cent. interest, which land contract *Bohn* took from *Beebe* with notice of all the facts stated; that *Beebe* threatens to sell, incumber, or dispose of the lands so conveyed to him, and 190 acres of other lands, near Madison, with the intent and purpose of preventing the plaintiff from collecting any judgment he may obtain in this action, and will, unless enjoined from so doing; that the defendant *Bohn* threatens to sell, assign, or dispose of his interest in the farm with a like intent and purpose, unless enjoined from so doing; and prays a rescission of the trade, etc., accordingly.

To that complaint each of the defendants separately demurred on the grounds, in effect: (1) That the court has no jurisdiction of the person of the defendant or the subject of the action; (2) that the plaintiff has not legal capacity to sue, by reason of his being weak, feeble-minded, and incompetent, as mentioned, and so can only sue by a guardian *ad litem* duly appointed; (3) that there is another action pending between the same parties for the same cause; (4) that there is a defect of parties plaintiff, by reason of his being

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weak, feeble-minded, and incompetent, as mentioned, and can only sue by a guardian *ad litem* duly appointed; (5) that several causes of action have been improperly united; (6) that the complaint does not state facts sufficient to constitute a cause of action against him. From the respective orders overruling such demurrers the defendants each separately brings his appeal.

For the appellants there was a brief by *G. S. Martin* and *Bushnell, Rogers & Hall*, and oral argument by *A. R. Bushnell.* They contended, *inter alia*, that the plaintiff had no legal capacity to sue in his own name, but must, under secs. 2613–2615, R. S., and Circuit Court Rule IX, secs. 1–3, sue by guardian *ad litem.* 1 Wait, Prac. 486; *Dutcher v. Dutcher*, 39 Wis. 651, 661; *Freyberg v. Pelerin*, 24 How. Pr. 202; *Parks v. Parks*, 19 Abb. Pr. 161. The complaint must allege the due appointment of such a guardian. *Crawford v. Neal*, 56 Cal. 321; *Brooke v. Clark*, 57 Tex. 105; *Grantman v. Thrall*, 44 Barb. 173. A cause of action in equity is improperly joined with one at law.

For the respondent there was a brief by *G. W. & H. S. Bird*, and oral argument by *G. W. Bird.*

CASSODAY, C. J. The mere fact that the complaint states that at the times mentioned the plaintiff was "of a weak and feeble mind, and not of sufficient mental capacity to attend to ordinary business transactions, or to protect and preserve his property rights," did not prevent him from commencing and maintaining this action. "Every action *must* be prosecuted in the name of the real party in interest, *except as otherwise provided* in sec. 2607," R. S. R. S. sec. 2605. The section thus referred to provides that "An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted." R. S. sec. 2607. "When an infant is a party, he must ap-

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pear by guardian." R. S. sec. 2613. Sec. 2614, R. S., prescribes how such guardian for an infant shall be appointed. Where an insane defendant is without a guardian, "the court, or a judge thereof, shall appoint a guardian of him for the action." R. S. sec. 2615. The same section provides that "If, during the pendency of any action, either party shall become or prove to be insane, the action may be prosecuted or defended by his guardian, in like manner as if it had been commenced after the appointment of the guardian, or the court, or judge, may appoint a guardian for the action as the case may require." "Such guardian for the action may be appointed upon the application of any party thereto, or of any relative or friend of such insane party," etc. R. S. sec. 2616. It is stated in the brief of counsel for the plaintiff that "these are the only statutes of this state requiring parties to appear in the circuit court by guardian *ad litem*," and counsel for the defendants fails to cite any other statute, and we find none. True, as conceded by counsel for the plaintiff, there are other statutes providing for the appointment by the county court, under certain circumstances, of guardians of insane persons, and of persons mentally incompetent to have the care and management of their own property, and drunkards or spendthrifts. S. & B. Ann. Stats. secs. 3976–3982. But none of these statutes preclude the plaintiff from commencing and maintaining this action upon the facts stated. Nor is there anything in Rule IX of the circuit court, cited by counsel, which prevents him from doing so. Since there is no statute requiring this action, upon the facts stated, to be commenced by guardian, there seems to be no reason why the plaintiff should not appear by his attorneys, and prosecute the action in the name of himself, as the real party in interest. R. S. sec. 2605. Of course, if the plaintiff becomes or proves to be insane, then, under a statute cited, "the court or judge may appoint a guardian for the action, as the case may require." R. S.

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sec. 2615. The trial court may be relied upon to protect the rights of all parties, and appoint a guardian whenever it is necessary. Besides, the authorities cited by counsel for the plaintiff are to the effect that at common law, and in the absence of a statute to the contrary, a weak and feeble-minded person of full age may bring an action in his own name, and appear by attorney, and not by guardian *ad litem*. *Faulkner v. McClure*, 18 Johns. 134; *Petrie v. Shoemaker*, 24 Wend. 85; *Cameron's Com. v. Pottinger*, 3 Bibb, 11; *Reed v. Wilson*, 13 Mo. 28; *Green v. Kornegay*, 4 Jones, Law (N. C.), 66; *Chicago & St. P. R. Co. v. Munger*, 78 Ill. 300. We are cited to no other authorities to the contrary. The objections that the plaintiff has not the legal capacity to sue, and that there is a defect of parties plaintiff, are not well taken.

It is equally clear that several causes of action are not improperly united. There is but a single cause of action stated, and that is to rescind the trade, and to restore to the plaintiff, as far as possible, the property wrongfully taken from him, and to give him damage so far as he has wrongfully been deprived of his rights. The complaint states a good cause of action.

By the Court.—Both orders of the circuit court are affirmed.

JACOBS, Respondent, vs. BEEBE, Appellant.

February 6—February 23, 1897.

Appealable order.

An order striking out a demurrer as being frivolous is not the same as one overruling a demurrer, within the meaning of ch. 212, Laws of 1895, and hence it is not appealable, even when made by the court. An order refusing to vacate a chamber order is not appealable unless the original order would have been appealable if made by the court.

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The State ex rel. Adams vs. Burdge and others.

APPEAL from an order of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Appeal dismissed.*

For the appellant there was a brief by *Bushnell, Rogers & Hall* and *G. S. Martin*, and a brief in reply and oral argument by *A. R. Bushnell.*

Chas. N. Brown, for the respondent.

WINSLOW, J. Upon motion made at chambers to strike out the defendant's demurrer to the complaint as frivolous, an order was made striking out the demurrer, with costs, and requiring an answer to be served within five days. Motion was thereupon made before the court to set aside the order made at chambers, but it was denied, and the defendant appealed from the last-named order.

The appeal must be dismissed, because the order is not appealable under ch. 212, Laws of 1895. An order striking out a demurrer as frivolous is not an order overruling a demurrer, within the meaning of that chapter, and hence is not appealable. *Gianella v. Bigelow*, 92 Wis. 267. Such an order not being appealable when made by the court, it follows that an order refusing to vacate it is not appealable. Orders refusing to vacate chamber orders are only appealable when the original order would have been appealable if made by the court. Subd. 4, sec. 1, ch. 212, *supra.*

By the Court.—Appeal dismissed.

THE STATE EX REL. ADAMS, Respondent, vs. BURDGE and others, Appellants.

February 8 — February 23, 1897.

Delegation of legislative power: State board of health: School children, compulsory vaccination of.

1. There is no statute in this state authorizing compulsory vaccination, nor any statute which requires vaccination as one of the conditions of the right or privilege of attending the public schools; and,

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in the absence of any such statute, a rule adopted by the state board of health January 26, 1894, and modified in June, 1894, excluding from public and other schools all school children who do not present certificates of vaccination, cannot be sustained as a valid exercise of the police powers of that board.

2. The state board of health is a purely administrative body, and has no legislative power, and none can constitutionally be delegated to it. The provisions of secs. 1409*b*, 1409*d*, S. & B. Ann. Stats., authorizing that board to make such regulations "as may in its judgment be necessary for the protection of the people" from contagious diseases, and giving them the power to designate what diseases are "contagious or dangerous to the public health," are an unwarranted delegation of legislative power.

3. Even if the state board of health possessed power to make such a rule excluding children from schools who do not present certificates of vaccination, it would be held to be void, because unreasonable, if at the time of its adoption there was no epidemic of smallpox existing in the state and but few cases scattered through the whole state, and if in the city where it was sought to be enforced there had been but one case and that had been properly quarantined, and the board of education had no belief or apprehension that it either is prevalent there or approaching the place.

APPEAL from a judgment of the circuit court for Rock county: JOHN R. BENNETT, Circuit Judge. *Affirmed.*

This was a proceeding against the school board of the city of Beloit to obtain a peremptory *mandamus* commanding the defendants, as such board, to permit the relator's three children to attend the public schools in said city, from which it was alleged they had been wrongfully and unlawfully expelled March 13, 1894, and had been excluded therefrom ever since, without any legal excuse or authority, solely on the ground that they had not been vaccinated with virus, as a preventive of smallpox. The defendants justified said expulsion and prohibition of said children from attending school, for the reason that none of them had presented to the principal or teacher of the school to which they respectively belonged a certificate of a reputable physician that they had been successfully vaccinated with virus, in order to prevent

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them from having smallpox, and under and by virtue of a certain rule adopted by the state board of health January 26, 1894, and a modified rule adopted in June, 1894, after the commencement of this proceeding. The rule professed, upon its face, to be made under sec. 1409*b*, S. & B. Ann. Stats., and was as follows, namely:

"Section 1. No child shall be allowed to be enrolled as a pupil in any public, private or parochial school in this state, or to attend any such school as a pupil without first presenting to the principal or teacher of the school in which he or she applies for enrollment or attendance, the certificate of a reputable physician that he or she has been successfully vaccinated."

This rule as amended reads as follows:

"Section 1. No child shall be allowed to be enrolled as a pupil in any public, private or parochial school, without first presenting to the principal or teacher of the school in which he applies for enrollment or attendance, the certificate of a reputable physician, that he has been successfully vaccinated, or in lieu of such certificate of successful vaccination a certificate from a reputable physician that such child has been vaccinated at least twice within a period of three months next preceding the date of such application; such latter certificate, however, shall be void after the expiration of one year from its date.

"Sec. 2. No parent or guardian of any child shall allow such child to attend any public, private or parochial school in this state, and no principal or teacher of any such school shall allow a child to be enrolled as a pupil, or to attend such school, without the evidence of vaccination herein required."

This section, as amended, reads as follows:

"Sec. 2. No parent or guardian of any child shall allow or permit such child to attend any public, private or parochial school in this state, and no principal or teacher of any such

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school shall allow a child to be enrolled as a pupil or attend such school as such, without the evidence of vaccination herein required, and it is hereby made the duty of the proper school authorities, in their respective localities, to enforce the foregoing rule."

It was alleged in the return, in substance, that said rules of the state board of health had been transmitted to the defendants, the Beloit school board, with a request that the same should be enforced, and that said school board passed a resolution by which it was provided that the clerk be instructed to notify the superintendent of the city schools of Beloit to require all school children to be vaccinated who were so required to be under the order of the state board of health, or to show successful certificates of vaccination on or before March 12, 1894, and that notice was given to the teachers of the public schools, accordingly, that the said rule must be enforced, etc.; that the relator's children had never been vaccinated, and he had at all times positively refused to allow them to be vaccinated; and that none of them had ever produced or presented to any principal or teacher of any public school of said city any certificate of successful vaccination, as required by said rule of said state board of health, and which, by order of the Beloit board of health of February 19, 1894, the superintendent of the city schools was directed to enforce; and that they were therefore excluded from attending public schools. It was admitted that there was not an epidemic of smallpox in said city at the time of such exclusion, but it was alleged that there was great danger of that disease becoming epidemic in the city, though there was not any case of smallpox in the immediate vicinity of the home or schools of said children.

At the trial, before the circuit court for Rock county, that court found that said rules of January 26th were passed by the board of health, and a copy thereof transmitted by it to C. W. Merriman, superintendent of the public schools of the

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city of Beloit, about February 6, 1894; that the schools of said city were public schools, organized and maintained at public expense by a system of taxation for the purpose of furnishing means of education to the resident children of the city of Beloit, Wisconsin, between the ages of four and twenty years, free of charge; that the defendants were then acting as the school board of the city of Beloit, and had in charge the management of said schools, and that on the 19th of February, 1894, they passed a resolution directing the superintendent of the city schools to require all children to be vaccinated, under said order, or to show certificates of successful vaccination on or before March 12, 1894, and that no child who would not comply with the same, and produce the proper certificates of successful vaccination before March 12, 1894, should be allowed to attend any of said schools after that date; that during the said months of January and February, 1894, there was no epidemic of smallpox existing within the state of Wisconsin, but that there were a few cases scattered throughout the state, and that there had been but one case in the city of Beloit, which had been duly and properly quarantined; that the relator was a resident, citizen, and taxpayer of the city of Beloit, and had three minor children, named in the writ, of the proper school age, living with him, and depending upon him for support and education; that they had been attending the public schools of the city of Beloit, in their proper grades, prior to the making of said resolution by the said defendant school board, and did so attend until about the 13th of March, 1894; that said relator refused to allow his children to be vaccinated, and said children refused to be vaccinated, on account of their belief, as Christian Scientists, that the operation or treatment of vaccination was morally wrong, and that the laws of God permit no such operation or treatment, and that to permit it is a breaking of such laws; that said children were of sound bodily health, and entitled to attend

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such public school, unless debarred by their refusal to be vaccinated, and they were expelled by reason of such refusal, and thereafter were not allowed to attend school; that in June, 1894, the substitute rule was adopted, and at that time, and at the time of filing the petition, there was no epidemic of smallpox, nor any case of smallpox in or near said city of Beloit; that the board of education had no belief or apprehension that it was prevalent in Beloit, or approaching it; that none of relator's children had been exposed in any manner to any case of smallpox or varioloid; and that there was no immediate, present necessity for a rule compelling scholars to be vaccinated. It was further found that two of relator's children were within the ages prescribed for the compulsory education of children by ch. 187, Laws of 1891.

The court granted a peremptory writ of *mandamus*, as prayed for, and gave a judgment accordingly, and for costs and disbursements against the defendants, from which the defendants appealed.

For the appellants there was a brief by *J. C. Rood*, attorney, and *Ruger & Norcross*, of counsel, and oral argument by *Wm. Ruger*. They argued, *inter alia*, that our statutes, secs. 1407, 1408, R. S., and secs. 1409*b*, 1409*d*, S. & B. Ann. Stats., confer upon the state board of health authority to make such rules as are in question in this case. Those statutes do not delegate legislative power. The powers conferred by them are to be deemed administrative, or at least as within the recognized exceptions to the rule against the delegation of such powers. *Raymond v. Fish*, 51 Conn. 80; 2 Am. & Eng. Ency. of Law, 432–4; *State v. Heinemann*, 80 Wis. 253, 256–8; *Hildreth v. Crawford*, 65 Iowa, 339; *In re Griner*, 16 Wis. 423, 434; *In re Oliver*, 17 id. 681, 686; *Coe v. Schultz*, 47 Barb. 64; *Hurst v. Warner*, 102 Mich. 238; *Minneapolis, St. P. & S. S. M. R. Co. v. Milner*, 57 Fed. Rep. 276, 279; *State ex rel. R. & W. Comm. v. C., M. & St. P. R. Co.* 38 Minn. 281; *Chicago & N. W. R. Co. v. Day*, 35 Fed. Rep.

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866, 875; *Filley v. S. F. & W. R. Co.* 5 id. 641, 657–9; *Atl. Exp. Co. v. W. & W. R. Co.* 111 N. C. 463; *Georgia R. & B. Co. v. Smith*, 9 Am. & Eng. R. Cas. 385; *U. S. v. Breen*, 40 Fed. Rep. 402; *People ex rel. Nechamcas v. Warden of City Prison*, 144 N. Y. 529; *Train v. Boston Disinfecting Co.* 144 Mass. 531; *U. S. v. Williams*, 6 Mont. 379; *Wayman v. Southard*, 10 Wheat. 1, 43, 46; *Port Royal Mining Co. v. Hagord*, 30 S. C. 519; *Railroad Comm. Cases*, 116 U. S. 307, 324, 336; *Reagan v. Farmers' L. & T. Co.* 154 id. 362–4, 393–4; *Locke's Appeal*, 72 Pa. St. 491, 498–9. The rules are reasonable and salutary, and are not in conflict with ch. 87, Laws of 1891. *In re Walters*, 84 Hun, 457; *In re Rebenack*, 62 Mo. App. 8; *Bissell v. Davison*, 65 Conn. 183; *Duffield v. Williamsport Sch. Dist.* 162 Pa. St. 476; *Abeel v. Clark*, 84 Cal. 226; *People ex rel. King v. Gallagher*, 93 N. Y. 438, 447. That act excepts children whose physical condition is such as to render school attendance inexpedient.

For the respondent there was a brief by *Fethers, Jeffris, Fifield & Mouat*, and oral argument by *Ogden H. Fethers*. To the point that the legislature cannot delegate the power to make a law, though it may confer some authority or discretion as to the mode of carrying it out, they cited *Dowling v. Lancashire Ins. Co.* 92 Wis. 63, 66; *Hurst v. Warner*, 102 Mich. 238; *Ex parte Cox*, 63 Cal. 21; *Board of Harbor Comm'rs v. Excelsior Redwood Co.* 88 id. 491. The rules adopted by the board would be void, even if made by the legislature itself, because unreasonable and not enacted from necessity. *Kosciusko v. Slomberg*, 68 Miss. 469; *Railroad Co. v. Husen*, 95 U. S. 465; *People ex rel. Copcutt v. Board of Health of Yonkers*, 140 N. Y. 1; *In re Smith*, 146 id. 69; *State v. Speyer*, 67 Vt. 502; *School Directors v. Breen*, 60 Ill. App. 201.

PINNEY, J. 1. The legality of the action of the defendants, constituting the school board of the city of Beloit, in expelling and excluding the relator's three children from the

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public schools in that city, which they were and had been respectively attending, and which they had a lawful right to attend, is attempted to be justified by the rule adopted by the state board of health of January 26, 1894, and as modified in June, 1894, after this proceeding had been commenced. The defendants were acting only under the supposed authority of the rule of the state board of health, and this presents the question of the power of the board to adopt and cause such a rule to be enforced. By sec. 1407, R. S., the state board of health is vested with "a general supervision throughout the state of the interests of the health and life of citizens," and directed to make certain *investigations*, and "voluntarily, or when required, advise public boards or officers," in regard to divers matters affecting the public health. By sec. 1408 the board was "to have charge of all matters pertaining to quarantine," and might from time to time "make general or local *rules and regulations* for the preservation or improvement of the public health not inconsistent with law, or those prescribed by *local* authorities pursuant to law," and "all sheriffs, constables, police officers, and all other officers and employees of this state, are required to respect and enforce the same, in every particular affecting their respective localities or duties." By secs. 1409*a*, 1409*b*, S. & B. Ann. Stats., an annual appropriation of $15,000 was made as a contingent fund, which might be used, under the conditions and restrictions of sec. 1409*b*, "to prevent the introduction of Asiatic cholera, smallpox, or other dangerous contagious diseases into this state, or the suppression and control of such disease, if the same shall be found already existent within the state." By sec. 1409*b*, the state board of health, the more effectually to protect the public health, was authorized to establish such systems of inspection as, in its judgment, might be necessary to ascertain the presence of the infection of Asiatic cholera or other dangerous contagious diseases, and to put the

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same in force, and might, "from time to time, make, alter, modify, or revoke rules and regulations *for guarding against* the introduction of contagious diseases into the state; for the *control and suppression* thereof, if within the state; for the *quarantine and disinfection* of persons, localities, and things infected, or suspected of being infected, by such diseases; . . . for the *proper sanitary care* of jails, asylums, school houses, . . . and the premises connected therewith, . . . and may declare any or all of its rules in force within the whole state, or within any specified part thereof; . . . and *in general* the state board of health shall have power, and it shall be its duty, *to make such rules and regulations*, and *to take such measures* as may in its judgment be necessary for the protection of the people of the state from Asiatic cholera, *or other dangerous contagious diseases.*" By sec. 1409*c* it is provided that "any person who shall neglect or refuse to obey the said rules and regulations, or who shall wilfully obstruct or hinder the execution thereof, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished for each offense by a fine of not less than $25, and not more than $500, or by imprisonment in any county jail for a period of not more than six months, or by both fine and imprisonment, in the discretion of the court."

The police power of the state is relied on to support the rule in question. This power has been defined in varying language, but of substantially the same general import. "All laws for the protection of life, limb, and health, for the quiet of the person, and for the security of property," fall within the general police power of the government. "All persons and property are subjected to all necessary restraints and burdens, to secure the general comfort, health, and prosperity of the state;" and it has been said that "it is co-extensive with self-protection, and is not inaptly termed 'the law of overruling necessity.' It is that inherent and

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plenary power in the state which enables it to prohibit all things hurtful to the comfort and welfare of society." Tiedeman, Lim. of Police Power, 2–5; Cooley, Const. Lim. 572; REDFIELD, C. J., in *Thorpe v. R. & B. R. Co.* 27 Vt. 140; *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 192; *State v. Noyes*, 47 Me. 189. As the police power imposes restrictions and burdens upon the natural and private rights of individuals, it necessarily depends upon the law for its support; and, although of comprehensive and far-reaching character, it is subject to constitutional restrictions, and, in general, it is the province of the lawmaking power to determine in what cases or upon what conditions this power may be exercised. As applied to the present case, the relator had a right, secured by statutory enactment, to have his children continue to attend the city schools in which they were respectively enrolled as pupils, and they, too, had a right to so attend such schools. Whether it be called a right or privilege cannot be important, for in either view it was secured to the relator, and to his children as well, by the positive provisions of law, and was to be enjoyed upon such terms and under such conditions and restrictions as the lawmaking power, within constitutional limits, might impose.

There is no statute in this state authorizing compulsory vaccination, nor any statute which requires vaccination as one of the conditions of the right or privilege of attending the public schools; and, in the absence of any such statute, we think it cannot be maintained that the rule relied on is a valid exercise of the rightful powers of the state board of health. The state board of health is a creation of the statute, and has only such power as the statute confers. It has no common-law powers. To lawfully exclude the relator's children from the city schools for the cause relied on required such a change in the existing law as the legislature alone could make, a change that should make vaccination of pupils

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compulsory, or, at least, prescribe it as a condition of the right or privilege of attending the public schools generally, or during the occurrence of certain emergencies, or upon the happening of certain contingencies or conditions, in respect to the prevalence of smallpox. The powers of the state board of health, though quite general in terms, must be held to be limited to the enforcement of some statute relating to some particular condition or emergency in respect to the public health; and, although they are to be fairly and liberally construed, yet the statute does not, either expressly or by fair implication, authorize the board to enact a rule or regulation which would have the force of a law changing the statute in relation to the admission and the right of pupils of a proper school age to attend the public schools. The state board of health had no legislative power, properly so called, and none could be delegated to it. It is purely an *administrative* body. The powers of the state government are vested in three departments, the legislative, to enact the laws; the executive, to execute them; and the judicial, to declare, construe, and apply them. The constitution (art. IV, sec. 1) declares that "the legislative power shall be vested in a senate and assembly." That no part of the legislative power can be delegated by the legislature to any other department or body is a fundamental principle of constitutional law, essential to the integrity and maintenance of the system of government established by the constitution, and repeatedly recognized and asserted by the courts. In the recent case of *Dowling v. Lancashire Ins. Co.* 92 Wis. 63, we had occasion to examine and apply this principle to an attempt to delegate the power, essentially legislative, to the insurance commissioner, to prepare, approve, and adopt a so-called standard fire insurance policy, the adoption of which would necessarily effect important changes in the law of fire insurance, a delegation of authority which would transfer bodily the legislative power on this subject to the

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insurance commissioner. We are satisfied that the conclusions there reached are correct, and sustained by numerous decisions of the highest courts of the country, some of which were there cited.

The application of the views there expressed is, we think, decisive against the validity of the rule under consideration. The language of the statute (S. & B. Ann. Stats. sec. 1409*b*) is very general, and goes to the extent of authorizing the state board of health "to make such rules and regulations and to take such measures as may, in its judgment, be necessary for the protection of the people from Asiatic cholera, or other dangerous contagious diseases," and by sec. 1409*d* it is declared that the term "dangerous and contagious diseases," as used in the act, "shall be construed and understood to mean such diseases as the state board of health *shall designate as contagious and dangerous* to the public health." The provisions of the statute import and include an absolute delegation of the legislative power over the entire subject here involved, and this, too, without any previous legislative provision for compulsory vaccination, or as a condition of enrollment of children of proper school age as pupils in the public school, or of their right to attend such schools. Without any other legislative authority than the right thus conferred, the state board of health assumed the power to so far control the public schools of the state as to require "the proper school authorities in their respective localities to enforce the rule in question." It cannot be doubted but that, under appropriate general provisions of law in relation to the prevention and suppression of dangerous and contagious diseases, authority may be conferred by the legislature upon the state board of health or local boards to make reasonable rules and regulations for carrying into effect such general provisions, which will be valid, and may be enforced accordingly. The making of such rules and regulations is an administrative function, and not a legis-

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lative power, but there must first be some substantive provision of law to be administered and carried into effect. The true test and distinction whether a power is strictly legislative, or whether it is administrative, and merely relates to the execution of the statute law, "is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law." The first cannot be done. To the latter, no valid objection can be made. Per RANNEY, J., in *Cincinnati, W. & Z. R. Co. v. Comm'rs of Clinton Co.* 1 Ohio St. 88. The same conclusions substantially were reached in *Field v. Clark*, 143 U. S. 650, 681, 694. Where an act is clothed with all the forms of law, and is complete in and of itself, it may be provided that it shall become operative only upon some certain act or event, or, in like manner, that its operation shall be suspended; and the fact of such act or event, in either case, may be made to depend upon the ascertainment of it by some other department, body, or officer, which is essentially an administrative act. There need therefore be no delay or embarrassment in such cases, as the legislature may easily so formulate the act as to adapt it, and make it operative upon any contingency or emergency. *Locke's Appeal*, 72 Pa. St. 491–498; *Moers v. Reading*, 21 Pa. St. 202; *Blanding v. Burr*, 13 Cal. 358. In the present instance neither method of legislation was adopted, and the fatal vice of the rule, in our judgment, is that there was no precedent or existing law under which it could be framed and adopted as an adjunct or act of administrative authority, to effectuate its purposes and carry it into effect. *School Directors v. Breen*, 60 Ill. App. 201. The cases of *Abeel v. Clark*, 84 Cal. 226, and *Bissell v. Davison*, 65 Conn. 183, were sustained by ample legislative authority. In the case of *Duffield v. Williamsport School Dist.* 162 Pa. St. 476, the authority to exclude from the schools those who had not been

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vaccinated rested upon an ordinance of the city, but whether there was precedent legislative authority does not appear. The making of such rules and regulations, to carry into effect the provisions of an act of strictly legislative authority, as was said in *In re Griner*, 16 Wis. 423, 434, "no more partakes of legislative power than that discretionary authority intrusted to every department of the government in a variety of cases. This practice of giving discretionary power to other departments or agencies, who were intrusted with the duty of carrying into effect some general provisions of law, had its origin at the adoption of the constitution, and in the action of the first congress under it, as the federal legislation abundantly shows. . . . But a distinction must be made of those important subjects which must be entirely regulated by the legislature itself from those of less interest in which a general provision may be made. . . . The line has not been exactly drawn which separates those important subjects which must be entirely regulated by the legislature itself from those of less interest in which a general provision may be made, and power given to those who are to act under such general provision to fill up the details." It not unfrequently occurs that provisions are found in legislative enactments which might well have been determined and regulated by some board or body having administrative powers, but it is safe to say, we think, that, where the provision in question lies strictly and solely within the domain of legislative authority, in all such cases there can be no delegation of the power to enact it. Our conclusion is that the rule under consideration could be made operative only as an act of legislative power, and it does not come within the domain of the power to make rules and regulations in aid or execution of some general statutory provision. This view is illustrated by reference to certain of the general provisions contained in sec. 1409*b*, yet of a sufficiently definite character, so that the state board of health, as an ad-

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ministrative body, might be authorized to adopt reasonable rules and regulations to carry them into effect. As to the matter of inspections authorized by the act, to ascertain the presence of the infection of Asiatic cholera or other dangerous and contagious diseases, and the power conferred on the inspector to enter any building, vessel, railway car, etc., as well as the quarantine authorized by sec. 1409, the power of the state board of health to make appropriate rules and regulations to effectuate the general purposes thus declared would seem to be free from doubt. *Hurst v. Warner*, 26 L. R. A. 484, 489, 492, 102 Mich. 238; *Train v. Boston Disinfecting Co.* 144 Mass. 523–531; *Health Dept. v. Knoll*, 70 N. Y. 535.

2. The circuit court held that the rule in question was unreasonable, and therefore void; and, had the state board of health possessed the power to make the rule, we agree it would have been void for that reason. The rule was an unreasonable and extraordinary one, and serves to enforce the importance and necessity of a strict adherence to the constitutional rule, that the power to make the law cannot be delegated to any board or body not directly responsible to the people. When the rule in its original form was adopted, there was no epidemic of smallpox existing in the state, but there were a few cases scattered throughout the state. There had been but one case in Beloit, which had been properly quarantined; and when the substituted rule was adopted in June, 1894, as well as when this proceeding was instituted, there was no epidemic of smallpox in or near the city of Beloit, or approaching it, and the defendant board of education had no belief or apprehension that it was prevalent in Beloit or approaching it. None of the relator's children had been exposed to it or varioloid, and there was no immediate necessity for the rule requiring scholars to be vaccinated. All these facts are established by the findings of the court, the correctness of which was not questioned at the argument;

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and yet, by an arbitrary rule, as by a single stroke of the pen, every child of school age, throughout the entire state, that had not been vaccinated, was excluded from the common schools, and forbidden to be enrolled as a pupil, or to attend school, without a certificate of successful vaccination from a reputable physician, or, in lieu thereof, a certificate showing that such child had been vaccinated twice within a period of three months next preceding its application for admission.

There must be, at least, circumstances apparently rendering such a rule or regulation necessary for the preservation of the public health. It would be a very extraordinary condition that would justify such a sweeping and far-reaching exercise of the power to make a rule of the character of the one in question either justifiable or proper, as the statute provides for making rules and regulations of local application only. Whether rules and regulations framed by an administrative body are reasonable or not is a question that may be determined in the courts, and, were there no other question in regard to the validity of this rule, we should feel compelled to declare it void as unreasonable and unnecessary. *Kasciusko v. Slomberg*, 68 Miss. 469; *In re Smith*, 146 N. Y. 68; *School Directors v. Breen*, 60 Ill. App. 201–208.

The question as to the validity of legislation making vaccination of children attending school compulsory is not presented by the record, and in respect to it we express no opinion. Two of the relator's children, affected by the rule of exclusion, are within the age prescribed for compulsory education of children by ch. 187, Laws of 1891; but, as this objection may be obviated by subsequent legislation, there is no occasion now to express any opinion in respect to it.

It follows from these views that the judgment of the circuit court is correct.

By the Court.— The judgment of the circuit court is affirmed.

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MARKWELL, Plaintiff in error, vs. PERELES and another, Defendants in error.

December 17, 1896 — March 16, 1897.

Parent and child: Custody of child.

1. Sec. 3964, R. S., secures to a father, as the natural guardian of his minor child, the right to its care and custody, "if he is competent to transact his own business and not otherwise unsuitable," and the mere fact that its maternal relatives, who have had the care of the child from its birth and have become attached to it and desire to continue to care for it, are able to secure to it better advantages than can its parent, does not render that parent *unsuitable* to have its care and custody, within the meaning of that statute.
2. Nor is the father of the child rendered *unsuitable* by the fact that he is of a somewhat cold, reserved, and unsympathetic nature, or that, by reason of his occupation, he is absent from home the greater part of his time; or that his second wife, in whose care the child is to be in his absence, is young and has had little experience in the care and management of children, so as to authorize the court to deny him the care and custody of the child as against such relatives.
3. Whether or not the father might, by an oral contract, cede away his parental rights and finally conclude himself in respect to them, yet the mere facts that, when the father, at his wife's funeral, requested to be left alone with her remains, her brothers did not leave the room; that one of them there, in the name of his wife, requested the father to consent that they should have the custody of the child, and, on his remaining silent, asked him to shake hands if he would not speak, and he did take their hands; and that he afterward left the child in their care for twenty-one months, during which time he paid its expenses and constantly claimed the right to its custody, do not establish a surrender on the father's part of his right to the custody of such child.

ERROR to review a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Reversed.*

This was a writ of error to review the order and determination of the circuit court for Milwaukee county in a proceeding by *habeas corpus*, brought by the plaintiff in error

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in behalf of his infant daughter, Fannie P. Markwell, of the age of about two years, and to procure her to be delivered to him by the defendants in error, the aunt and uncle of said infant, in whose custody she then was. Proper return was made to the writ by the respondents, upon which issue was taken by the petitioner.

The court ruled at the trial that the burden of proof was on the respondents, and found the facts to be that the petitioner was married to Julia E. Pereles, the sister of *James M. Pereles*, one of the respondents, May 26, 1892; that the child, Fannie, was born to them August 13, 1893, and that its mother died October 14, 1893, at New York, where her husband then and ever since has resided; that after the birth of the child, its mother, while still ill, requested the respondent *Jennie W. Pereles*, in case of her death, that she should "take the said child into her care and custody," and that the petitioner knew thereof and assented, or at least did not object, thereto; that he voluntarily surrendered the custody of said child to said respondents immediately after the death of its mother; that they thereupon took the child into their custody, and assumed the duty and responsibility of caring for it as their own; that they understood at the time or soon thereafter that it should remain with them until it arrived at years of discretion, and that the petitioner, by his words, acts, and conduct, sanctioned and approved such understanding on their part until very recently, and that they had had the exclusive care and custody of the child, pursuant to such understanding, ever since the burial of its mother, October 19, 1893; that the child has an affectionate and highly nervous and sensitive disposition, and that it is happy and contented in its present home with the respondents, is greatly attached to them, who are in turn as much attached to her as parents could be to their own child; "that the petitioner, while of good moral character and business habits, is *of a somewhat cold, reserved, and unsympathetic*

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nature, rather than warm hearted, and affectionate, and has never exhibited much love or affection for said child; that he is a traveling salesman by occupation, employed by a New York firm to sell goods on commission, from which he derives the greater part of his income, and in the course of his business must be absent from his home a great part of his time; that he remarried within the last thirty days, and his present wife is a young woman, who has had little or no experience in the care and management of children," and "is of no blood relationship to, and has had little or no acquaintance or intercourse with, the child;" that the respondents have a comfortable home in Milwaukee, are possessed of ample means, and are abundantly able and willing to care for, maintain, support, and educate said child at their own expense, so long as she may want a home, and to provide her with every material advantage of life; that to remove her from her present custody and home to the home of the petitioner in New York, to the custody to which she must there be committed, would be prejudicial to her best interests and welfare; that it is greatly to the advantage and best interests of said child that she remain with the respondents, at least until she arrives at years of discretion, and that the petitioner, *under all the circumstances of the case, is not a suitable person to have the care and custody of said child.*

And it was also found that he had demanded of the respondents, from time to time, statements of their disbursements for the care and custody of his child, and the wages of its nurse, paid by them, statements of which were rendered by the respondents, and paid by the petitioner.

The court dismissed the writ, and by its order remanded the child to the custody of the respondents until she should arrive at the age of fourteen years, when she might select her own custodian, and ordered that the petitioner should have the free and unrestricted right to visit said child in the

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house of said respondents, or elsewhere, at all reasonable or proper hours, without insult, let, or hindrance on the part of the respondents, and that as a condition of the right of the respondents to retain the custody of the said child, as against the father's right of custody; the said *James M. Pereles*, pay the petitioner all the moneys of which he had any knowledge, paid by the petitioner for the support and maintenance of said child since it came into their custody. There was no evidence tending to establish any other or different grounds for denying the petitioner the care and custody of his child than as are thus stated in the finding. Such other facts as are material will appear in the opinion.

For the plaintiff in error there were briefs by *Miller, Noyes, Miller & Wahl*, and oral argument by *G. H. Noyes* and *J. C. Spooner*. They argued that to justify a denial of the father's right to the care and custody of his infant child, there must be clear and satisfactory proof that he is unsuitable. *In re Goodenough*, 19 Wis. 274; *Johnston v. Johnston*, 89 id. 416; *In re Agar-Ellis*, L. R. 10 Ch. Div. 49, 71. He must have so conducted himself as to render it not merely better for the child, but essential to its safety or welfare in some very serious and important respect. *In re Flynn*, 2 De Gex & Sm. 457; *Weir v. Marley*, 99 Mo. 484, 494; *In re Scarritt*, 76 Mo. 565, 582; *Comm. v. Briggs*, 16 Pick. 205; *Lovell v. House of Good Shepherd*, 9 Wash. 419; *State ex rel. Sharpe v. Banks*, 25 Ind. 495. Even an agreement by the father giving to another the custody of his child will not prevent his subsequently reclaiming it. *Brooke v. Logan*, 112 Ind. 183; *Ex parte Clark*, 87 Cal. 638; *State ex rel. Hodgdon v. Libbey*, 44 N. H. 321; *State ex rel. Herrick v. Richardson*, 40 id. 272; *State ex rel. Mayne v. Baldwin*, 5 N. J. Eq. 454; *State v. Clover*, 16 N. J. Law, 419.

For the defendants in error there were briefs by *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *J. G. Flanders*. They contended, among other things, that

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neither parent has any absolute right to the custody of a child; but the paramount consideration is, What do its best interests demand? *U. S. v. Green*, 3 Mason, 482; *Corrie v. Corrie*, 42 Mich. 509; *Mercein v. People ex rel. Barry*, 25 Wend. 64; *Clark v. Beyer*, 32 Ohio St. 299; *Bonnett ex rel. Newmeyer v. Bonnett*, 61 Iowa, 199; *Chapsky v. Wood*, 26 Kan. 650; *Gishwiler v. Dodez*, 4 Ohio St. 615; *Harris v. Harris*, 115 N. C. 587; *Sturtevant v. State*, 15 Neb. 459. A court will not restore the custody of a child to parents who have voluntarily relinquished it to others, unless on hearing all the facts it is of the opinion that the best interests of the child require it. *Legate v. Legate*, 87 Tex. 248; *In re Snook*, 51 Kan. 219; *Jones v. Darnell*, 103 Ind. 569; *Green v. Campbell*, 35 W. Va. 698; *Hussey v. Whiting*, 44 N. E. Rep. (Ind.), 639. A parent is not *suitable* to have the custody of his child, within the meaning of sec. 3964, R. S., if for any cause the welfare of the child requires that it be given to another. *Schiltz v. Roenitz*, 86 Wis. 31; *State ex rel. Flint v. Flint*, 63 Minn. 187.

The following opinion was filed January 12, 1897:

PINNEY, J. 1. By the common law, the father is considered as the natural guardian of his minor children, and entitled to their custody; and by the earlier cases his right to such custody could not be controlled by courts of law upon *habeas corpus*, but the court of chancery in England would interfere to control his paternal rights, and deprive him of the custody of his children, and to award it to some suitable person as guardian, where it was shown that he had forfeited his right by reason of gross ill-treatment, cruelty, or abandonment, or when his conduct and life were such as became injurious to the morals and interests of his children. 2 Story, Eq. Jur. § 1341; 2 Kent, Comm. *193. As a result of the duty to maintain, protect, and educate his children, the father is entitled to the custody of their persons, and to

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their labor or services; but this right is not absolute. This right of the father, like any other right, may be lost or forfeited by his misconduct; and in such cases courts of equity, to promote the welfare and best interests of the children, have taken them from him, and placed them in the custody of others; and this jurisdiction is exercised in this country in proceedings by *habeas corpus* affecting the custody of infants. *Dumain v. Gwynne*, 10 Allen, 271. In *Comm. v. Briggs*, 16 Pick. 205, it was said by SHAW, C. J., that "In the case of a child of tender years, the good of the child is to be regarded as the predominant consideration. There may be cases in which the court would not interfere, in favor of the father, to take the child from any safe custody to deliver it to him, as where he is a vagabond, and apparently wholly unable to provide for the wants and safety of the child. . . . And the court will feel bound to restore the custody, where the law has placed it, with the father, unless in a clear and strong case of unfitness on his part to have such custody." The relative rights of the parents to the custody of their children, when they have separated and are living apart, was very elaborately and fully considered and discussed in the case of *People v. Mercein*, in its different stages in the court of chancery, in the supreme court, and in the court of errors, of New York, and the right of the father to the custody of the minor children was sustained substantially as stated. *People ex rel. Barry v. Mercein*, 8 Paige, 47; 3 Hill, 399; *Mercein v. People ex rel. Barry*, 25 Wend. 64.

The question vital to this controversy depends, we think, upon the proper construction and effect to be given to sec. 3964, R. S., which has been in force ever since 1849, providing that "The father of the minor, if living, and in case of his death, the mother, while she remains unmarried, being themselves respectively *competent to transact their own business, and not otherwise unsuitable*, shall be entitled to the

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custody of the person of the minor, and to the care of his education." R. S. 1849, ch. 80, secs. 5–7. It was held in *In re Goodenough*, 19 Wis. 275–277, that "If the father apply for the custody, the child should, if within the age of nurture, which is fixed at fourteen years, be delivered over to him, unless there is something in his situation or conduct which renders him unfit for the trust. *Prima facie*, the father is entitled to have his child delivered to him, unless there is enough shown in the return to rebut that right. The exception, as we have seen, is where it appears that the father is an improper person to have the care and management of the child." And the court quoted with approbation from *State v. Richardson*, 40 N. H. 272, to the effect that in determining this question the court will take into consideration the right of the father, his ability, inclination to perform faithfully the trust imposed upon him, the present condition of the child, and, if of years of discretion, its wishes upon the subject; and, furthermore, that "a proper regard to the sanctity of the parental relation will require that the objection be sustained by clear and satisfactory proofs." In the case of *Ramsay v. Ramsay*, 20 Wis. 507, which was a contest for the custody of a female child of the age of two years between its mother and its uncle, who had been irregularly appointed its guardian after the death of its father, the parents had separated. The wife was living with her father, and the husband had enlisted and died in the army; and testimony was given to the effect that the husband left the child with the defendant, his brother and its uncle, saying he wished him to take and bring it up as his own. Four other witnesses testified to similar declarations he had made at about the time he entered the army; that he had given his daughter, Libbie, to his brother, Robert, to take care of and bring her up as his own child. Evidence was given tending to show that the mother was an unfit person to have the custody of the child, but the court, Cole, J., deliv-

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ering the opinion, evidently written with this statute before him, said: "There is no good reason shown for depriving the mother of the care and custody of the child. It is an infant female, about two years old; and on the death of the father the mother became its lawful guardian. It may be that the mother has no means to support and maintain the child, but this furnishes no just cause for depriving her of its custody, and giving it to the paternal uncle. The guardian by nature, on the death of the father, is the mother. She has *the right* to the person of the child, unless it appears that she is *an unfit person* to have control of it. An effort was made to show that she was destitute of affection for her offspring, or was of so quick and violent a temper as rendered her *unfit or unsuitable* to have charge of the child. The proof, however, fails to establish any such case. It does not show that her character or conduct has been such that a court would be authorized to interfere and deprive her of the care and custody of this infant child." And she had judgment in her favor. The subsequent case of *Sheers v. Stein*, 75 Wis. 50, is in substantial accord with the cases already cited, and it was there held that the statute leaves open "the inquiry as to the suitableness of the parent to have the custody of the child," and in that immediate connection the opinion of the court states that it seems quite obvious "that if, for any cause, the welfare of the infant demands that its care and custody be withheld from the parent, and given to another, the parent is not a suitable person, within the meaning of the statute. It was so held, in effect, in *In re Goodenough*, 19 Wis. 274; yet it was held on *habeas corpus* that it was within the sound discretion of the court or officer to change the custody of an infant of tender years, and that sufficient appeared to justify the exercise of such discretionary power in that proceeding by refusing to give the custody of the child to the petitioner, who was its father. The refusal *went upon the ground* of

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the bad character of the father; but manifestly the same rule is applicable if any other valid *cause of unsuitableness* exists." This is all that, in point of law, was decided in that case, and the court refused the father the custody of his child solely on the ground of his *unsuitableness* for its care and custody; and the child was remanded to the care and custody of the respondents, because of their suitableness for the trust.

Certainly the court did not decide, or intend to intimate, that the suitableness of the respondents for the care and custody of the child constituted *per se*, or tended to show, unsuitableness on the part of the father; for it is entirely clear that the statute is not susceptible of so absurd a construction as to permit the custodian to withhold from the father the custody of his child, when he was not unsuitable to care for and educate it, simply because such custodian was equally, or perhaps more, able or competent. Such a ruling would be destructive of parental rights and authority, and subversive of social order, founded so largely on the sanctity of the home and family relations. In the subsequent case of *Schiltz v. Roenitz*, 86 Wis. 31, 37, it was said, after quoting the statute, that "the statute intervenes only upon the destitution and necessity of the child, and in all cases of controverted right to its custody its welfare is a matter of primary consideration," and is especially applicable to cases such as *Johnston v. Johnston*, 89 Wis. 416, which was a controversy between the parents who had separated and were living apart, for the care and custody of their children (and such are many of the cases relied on by the respondents), and where the right of the father was affirmed, if he was not an unfit person for the trust; but, it being conceded that he was unfit, it was held that the court rightly refused, at his request, to take them from their mother, in order to give them to their paternal grandfather, who was wealthy, and evidently attached to them, and had done

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much for their support in the past; that the mother, not being unsuitable, was not to be deprived of their care and custody, or the children of her companionship or affection, because she was in straitened circumstances, although their paternal grandfather was willing at that time to give them better advantages in life than those to which they were born. The decisions in this state under this statute are, we think, in substantial accord, and must be regarded as holding that the statute secures to the father, as the natural guardian of his child, the right to its care and custody, if he is competent to transact his own business and not otherwise unsuitable; and that he is not rendered unsuitable by the fact that there are those attached to the child, having or desiring its care and custody, who occupy a higher position in the social scale, or are able to give or secure to it advantages in life better than those of the station to which it was born. We feel bound to follow the plain, obvious meaning of the statute, and the construction placed upon it, whatever may have been held in other jurisdictions in the absence of statutory provision.

2. The trial court found, in substance, that the petitioner was of good moral character and business habits, and that he was competent to transact his own business. The evidence abundantly established it. Do the findings show that he was "otherwise unsuitable" to have the care and custody of his child? The only finding that imputes to him unsuitableness is to the effect that "he is of a somewhat cold, reserved, and unsympathetic nature, rather than warm hearted and affectionate, and has never exhibited much love or affection for said child; that he is a traveling salesman by occupation, . . . and in the course of his business must be absent from his home a great part of his time." This presents the question whether it may properly be held, as a matter of law, that a father, described and circumstanced as stated, is *unsuitable* to have the care and custody of his

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child, and may, therefore, be deprived of his parental rights; and that none but the warm hearted and affectionate, who are effusive and demonstrative in their parental affections, are to be protected in the enjoyment of such rights. Profuse and constant professions of love and affection are often empty and delusive, while beneath a quiet and dignified reserve the current of a warm and devoted affection is constant and active. The petitioner has now a home and another wife, against whom no objection has been made, save that she is young and has had little or no experience in the care and management of children. Are the parental rights of a father, who, by reason of his occupation, is absent from his home the greater part of his time, entitled to no consideration, so that in such a case he may not have the care, custody, and presence of his infant daughter to gladden and make it cheerful? We cannot regard any or all of these specifications of unsuitableness as amounting to such under the law, or as furnishing any ground whatever for denying to the petitioner his sacred rights of paternal custody, companionship, education, and control; and we think that to hold that these findings show that the petitioner is unsuitable to have the care and custody of his infant child would be to give a serious blow to the most universal and tender of all natural relations, and to the security and sanctity of family ties. The finding is further that to remove said child from its present custody to the home of her father in New York, *to the custody* to which it must be committed, that is to say, to the custody of her father, who is not really unsuitable for the trust, would be prejudicial to the best interests and welfare of the child, without other specific finding of fact going to show his personal unsuitableness, and that "under all the circumstances of the case the petitioner is not a suitable person to have the care and custody of the child." The other facts referred to, we must presume, are the other facts specifically found, and sufficiently stated

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above. These views as to parental rights, and as to what constitutes unsuitableness to have the care and custody of children, are in accord with, and sustained by, recent decisions of the highest courts of England. *In re Agar-Ellis*, 10 Ch. Div. 49; *In re Newton* [1896], 1 Ch. Div. 740–749. In *In re Fynn*, 2 De Gex & S. 457, it was declared that "A man may be in narrow circumstances; he may be negligent, injudicious, and faulty as the father of minors; he may be a person from whom the discreet, the intelligent, and the well-disposed, exercising a private judgment, would wish his children to be, for their sakes and his own, removed; he may be all this without rendering himself liable to judicial interference, and in the main it is for obvious reasons well that it should be so. Before this jurisdiction can be called into action between them, it must be satisfied, not only that it has the means of acting safely and efficiently, but also that the father has so conducted himself, or has shown himself to be a person of such a description, or is placed in such a position, as to render it not merely better for the children, but essential to their safety or to their welfare, in some very serious and important respect, that his rights should be treated as lost or suspended,—should be superseded or interfered with. If the word 'essential' is too strong an expression, it is not much too strong." *Reg. v. Gyngall*, 4 Reports, 448–454; *In re Goldsworthy*, 2 Q. B. Div. 75. We hold, therefore, that upon the facts appearing of record and found the order and determination denying the petitioner the relief prayed for is erroneous.

3. An examination of the facts in the case leads us to the same conclusion. Without adverting to the many minor matters of no material weight, and which appear to have been so regarded by the trial court, the salient facts, in brief, are: That the petitioner had had a very considerable experience in mercantile affairs, and was, and had been for several years, engaged as a traveling salesman for a firm in

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New York, upon a salary of $7,500 per annum, and required to make two trips each year, of about six or eight weeks' duration each, to the Pacific coast. The rest of the time he was engaged in New York. And he received some income from other sources. After the marriage of the petitioner to Julia E. Pereles, they went to New York to live, and then to Bayswater, Long Island, where they remained until September, 1892. While there, she was taken suddenly and seriouly ill, and her life was despaired of; but, after her recovery, she, with her husband, visited Milwaukee, and she remained with the respondents while he made his western trip, and then they returned to New York, where they resided until her death. He had delayed his western trip in the fall of 1893 three or four weeks on account of the birth of the child, and when he left for the Pacific coast, his wife's health had been fully restored, so that physicians advised him there was no danger in his going. Her death was the result of a very sudden attack, which terminated fatally in about forty-eight hours. He received the intelligence by telegram October 14th, and immediately started for Milwaukee, arriving there on the 18th, meeting T. J. Pereles at Chicago, who, with the respondent *Mrs. James M. Pereles*, and the child and its nurse, were on the way to Milwaukee, with the remains of the deceased. The funeral occurred the next day from the residence of the respondent *James M. Pereles*. At the conclusion of the services, the petitioner requested to be left alone with the remains, and every one left the room but the respondent *James M. Pereles*, and his brother, T. J. Pereles. The former then said to the petitioner, as he testified, "Now, *Nathan*, before we remove all there is left to us of our sister, I ask you at the bier of your wife to say that we three take care of Fannie, the only baby; and *Jennie*, my wife, shall have the care and custody of that little darling." He did not answer, and respondent then said, "If you cannot speak, let us shake hands." That the

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three then shook hands, and then he, *James M. Pereles*, and his brother went out of the room. A few days thereafter T. J. Pereles insisted on the petitioner signing papers, putting this in writing, or having a guardianship, and the petitioner said he thought it was not necessary to have a guardian, and *James M. Pereles* said he thought not; that he was willing to take *Nathan's* word. That of course he "had in mind the promise at the coffin." That afterwards, in January, the petitioner said that "We want to be friends, and want to carry out our arrangements about the child,—the custody of the child." What I have in mind, as I understood it, "was in reference to the arrangements we had made at the death of my sister." T. J. Pereles' testimony was in substance the same as his brother's in respect to what took place at the bier of the deceased wife. He testified as to the suggestion that *James M. Pereles* be appointed guardian of the child, and that, "after considering the matter, *Mr. Markwell* refused to consent." In the July following, the petitioner, in a letter, claimed the right to the custody of the child, and in October, 1894, he made claim for it, but said he would not take her away then. He then said, as *James M. Pereles* testified: "If I want to get married, I want to get the child. Don't you think I have a right to the child?" And witness replied, "Yes, under certain circumstances you have; but in this case I don't think you have." He said, "Has not the father a right to the child?" Witness replied, "The father has as good a right if he lives in a hovel as if he lives in a mansion." He said, "If I get married, haven't I a right to the child?" Witness replied: "We won't cross a bridge until we get there. Under our arrangement, you are not entitled to *our* child, and we want to live up to our arrangement."

The petitioner testified as to the occurrence after the funeral services; that he asked to be left alone with the remains; that both the *Pereles* brothers remained, and said something

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at that time, and that all he remembered that was said, and on which he may have given his hand to them, was, "Let us be uncles and aunts to this child always;" that he did not remember that *James M. Pereles* said words to the effect that the three should take care of the child, and that *Mrs. Pereles* should have the custody of it, but he did remember that they said something, and that he remained silent, and afterwards, when they extended their hands to him, he took them; that a day or two after the burial, T. J. Pereles proposed that *James M. Pereles* should be appointed guardian of the child, and he promised to think it over, and that nothing was said in January about the custody of the child; that he stated to them in October, 1894, that he had come to take his child, but, after due consideration and advice of friends, he had concluded to leave it for the time being, but told them that at some future time he might be able to offer it a home, and then he should certainly desire his child to live with him, and to bring it up; that the next conversation on the subject was in October, 1895, when he was referred by *James M. Pereles* to his wife, one of the respondents (there having been some previous correspondence on the subject). He told her he should come for the child about November 20, and she refused to give it up. On November 12, 1895, the petitioner was married to his second wife, a lady of the age of about twenty-eight years. On the 19th of the same month his wife went to Milwaukee with him, and he called on both respondents; but *Mrs. Pereles* said she had not changed her mind.

The respondent *Jennie W. Pereles* testified to a conversation with the mother of the child, after its birth, when she urged witness, and said, "*Jennie*, if ever anything happens to me, will you take care of my baby?" And that she told her she would, if that was any satisfaction to her, but she was perfectly healthy under the circumstances of the case; that she told her she must not think of these things, but, if

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it was any comfort to her, she would promise to take it. Dr. G. D. Ladd, on the part of the respondents, testified that he had practiced for twenty years, and to his knowledge of the child, and to having been called upon to attend her; that she was a nervous and excitable child, and the effect of transferring her from the home of the respondents to another home presided over by strangers, would be to temporarily excite and disturb her, until she became established and acquainted with the new home; the after-effect would depend upon what the home was; and that she was ordinarily healthy and strong, and enjoyed good health while in his care; that she would be some time in forgetting those who had her in charge, but that a child of that age (somewhat over two years) does not form such strong attachments, even to its parents, but that it would change; that she was physically and mentally able, and could, with proper care, be transferred from Milwaukee to New York, and not injure her health. On the part of the respondents there was produced the testimony of eight ladies who knew the child and the respondents, showing that in their opinion the child was and had been well cared for, and could not have a better home than that of the respondents, and that they were very much attached to it, and that it was a very lovable child; that they had no acquaintance with or knowledge of the petitioner, and gave their opinion to the effect that it would be for the advantage of the child to remain where she was; that a change of custody would produce a shock to the nervous system of the child. Some were quite decided, others were reserved and cautious in their opinions as to the probable effect of the change. Some thought the change would be harmful, and some based their opinion upon the nervous and sensitive nature of the child.

It further appeared from the testimony of the petitioner that after his second marriage he rented a house in New York for $1,200 a year, which was ready for occupancy, and

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provision had been made for furnishing it as a home for himself and wife, and that it was in as healthy a locality as any in the city; that he visited the child in Milwaukee twelve times after the death of his wife, before this writ issued, and it appears that he had made it various presents,— toys, articles of clothing, etc. Over 160 letters and a few telegrams from the petitioner to one or the other of the respondents were produced and put in evidence, which were all written within the course of about two years, and they abounded in expressions of love, affection, and tender solicitude for his child. He expressed himself as pleased with the attention, care, love, and affection extended to her, and the home his child had, and that she could have no better; that it was more than fortunate that it was possible for her to have such a home.

We cannot give our assent to the conclusion that what took place between the parties at the close of the funeral services ought to be regarded or enforced as a binding contract, precluding the petitioner from thereafter claiming the care and custody of his child, even if it be conceded, as a matter of law, that the father might, by an oral contract, cede away his parental rights, and finally conclude himself in respect to them,— a proposition denied by the great weight of authority. *Brooke v. Logan*, 112 Ind. 183; *Ex parte Clark*, 87 Cal. 638; *Weir v. Marley*, 99 Mo. 484; *In re Stockman*, 71 Mich. 199; *State v. Libbey*, 44 N. H. 321; *State v. Richardson*, 40 N. H. 272. In these cases, the questions here discussed in relation to the rights of the father to the care and custody of his infant children are fully considered, and many authorities are cited. The petitioner had asked to be left alone in the room with the remains of his wife, about to be taken to the place of burial. The brothers, however, remained, and at that juncture, and in the painful and solemn presence of his dead wife, he was asked to give away the care and custody of all that remained of his little

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family. What could he have properly said or done on that occasion? What remained to him but silence, and could he be expected to decline to take the offered hands of the brothers? While he spoke no word, it seems to be insisted that by this occurrence, and by leaving his child in the care and custody of the respondents for a period of about twenty-one months, until he regained another home, he had surrendered or lost his parental rights in respect to his infant daughter. We are unable to conclude from this occurrence, or from any evidence in the record, that any such conclusion can be properly drawn. As already stated, he insisted on his parental rights at different times, and quite distinctly. There is no reason to think the respondents did not understand his position and claim. There is no material conflict of evidence in the vital questions in the case, and the question is, what conclusion ought to be drawn from the practically conceded facts. We think that the main conclusions of fact arrived at by the circuit court are not warranted and sustained by competent evidence, and that upon uncontradicted evidence no legal reason has been shown to exist why the petitioner should not now have the care and custody of his child. The evidence is not sufficient, we think, to justify any reasonable apprehension of harm or injury to the child in transferring her custody from the respondents to the petitioner, or that it would be prejudicial to the interests and welfare of the child. The judgment of the circuit court is erroneous, and must be reversed.

By the Court.—The order and judgment of the circuit court is reversed, and the cause remanded to that court, with directions to award the care and custody of the infant child, Fannie P. Markwell, to the said petitioner.

A motion for a rehearing was denied March 16, 1897.

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MARKWELL, Plaintiff in error, vs. PERELES and another, Defendants in error.

December 17, 1896—January 12, 1897.

Practice on writ of error.

The occasion for a motion to modify a judgment having been removed by the reversal of the judgment, a writ of error to review the order denying it will be dismissed.

ERROR to review an order of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Writ dismissed.*

For the defendants in error there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas.*

PINNEY, J. This is a writ of error to reverse an order, made after judgment in a *habeas corpus* case, denying a motion to modify such judgment. The judgment in that case having been reversed, there is no occasion for further prosecution of this writ, and it is therefore dismissed.

By the Court.—It is so ordered.

CITY OF MILWAUKEE, Respondent, vs. MILWAUKEE COUNTY and another, Appellants.

December 21, 1896 — March 16, 1897.

Taxation, exemption from: Land held by city under optional contract.

Land of which the legal title remains in the vendors, but the actual possession is in the city of Milwaukee under contracts which give it the option to become the owner on making certain payments, with the right to possession until default, but create no legal obligation on the part of the city to purchase or make the payments, cannot be considered as either owned exclusively or held under a lease by the city, and is not therefore exempt from taxation under either subd. 2, sec. 1038, R. S. 1878, or sec. 11, subch. XX, of the city charter (ch. 184, Laws of 1874).

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City of Milwaukee vs. Milwaukee County and another.

APPEAL from an order of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Reversed.*

This is an action in equity, brought by the city of *Milwaukee* against the county of *Milwaukee* and the county treasurer, for the cancellation of county, school, and state taxes levied upon certain lands in the town of Wauwatosa, but occupied by the city for park purposes. The legal title to the lands in question at the time of the levying of said taxes was in William H. Perrigo and others, but the city was in possession thereof under certain contracts, dated October 13, 1891. The terms of the contracts are quite fully set forth in the opinion written by the present chief justice in the case of *Perrigo v. Milwaukee*, 92 Wis. 236, as follows: "By the terms of the agreement, the city, upon making the first payment, was entitled to the possession of the premises, with the right to alter, change, and improve the same, to be used as a public park, pursuant to ch. 488, Laws of 1889, and ch. 179, Laws of 1891; but it had no right to a conveyance of the legal title thereof until it had, within the ten years mentioned, paid the balance of the purchase price,— $46,487.94,— with the interest thereon, payable annually, and all taxes assessed on the premises after January 1, 1891. For any failure of the city to make any payment of purchase money or annual interest or taxes at the times and in the manner specified, the Perrigos, their heirs, executors, administrators, and assigns, were thereby expressly authorized, by action or proceedings at law or in equity, to bar and foreclose all right and equity of redemption of the city in the premises. But each of the legislative enactments mentioned expressly provides that such purchase or agreement to purchase should be 'without creating any corporate liabilities therefor;' and the agreement expressly provides that the same should 'not create any corporate liability against' the city 'in any manner or form,' and that the Perrigos would 'not claim any corporate liability against' the city 'by rea-

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son thereof.'" In that case it appeared that the city had attempted to tax Perrigo's interest in one of the contracts as personal property, he being a resident of the city, and it was held not taxable as personal property, because it created no debt, and was a mere possibility or expectancy attached to the real estate.

The complaint in the present action set forth the possession of the city under such contracts, and the fact that state, county, and school taxes had been assessed thereon for the year 1895, and demanded cancellation of the same on the ground that the lands in question were owned by the city and exempt from taxation. A preliminary injunction, restraining the sale of the lands *pendente lite*, was granted by the circuit court upon the complaint. The defendants appeared, and demurred generally to the complaint, and moved to dissolve the temporary injunctional order, which motion was denied, and the defendants appealed.

The case was submitted for the appellants on the brief of *A. C. Brazee*, district attorney, and *A. W. Bell*, assistant district attorney, and for the respondent on that of *C. H. Hamilton*, city attorney, and *Ernest Bruncken*, assistant city attorney.

Counsel for the appellants contended that the city of *Milwaukee* did not "exclusively own" the land in question so as to render it exempt. It had only an option to buy and was under no obligation to do so. *Perrigo v. Milwaukee*, 92 Wis. 236. Exemptions can be allowed only when granted in clear and unmistakable terms. 1 Desty, Taxation, 132; *Weston v. Shawano Co.* 44 Wis. 256.

The following opinion was filed January 12, 1897:

WINSLOW, J. By R. S. 1878, sec. 1038, subd. 2, all property owned *exclusively* by any "county, city, village, town or school district" is exempt from taxation. By the charter of the city of *Milwaukee* (ch. 184, Laws of 1874) it is

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provided that "the city may *lease*, purchase and hold real or personal estate sufficient for the convenience of the inhabitants thereof, and may sell and convey the same and the same shall be free from taxation." Subch. XX, sec. 11. The simple question is whether, under either of these provisions, the land in question was exempt from taxation. The city had certainly not leased it, nor had it purchased it, nor did it own it exclusively. As pointed out in *Perrigo v. Milwaukee*, 92 Wis. 236, the legal title was in the vendors, and the city simply had an option to purchase with the right to possession until default. It was not bound to pay the purchase money. Under these circumstances, we are unable to see how the land could be considered either as owned exclusively by the city or leased by the city. The principle that the vendee in possession of land under a contract of purchase which binds him to pay the purchase money is the equitable owner, and, in the absence of express agreement, must pay the taxes (*Williamson v. Neeves*, 94 Wis. 656), has no application for the reason that the city is not holding the land under a contract of purchase. The city may choose to acquire the title by paying the sums named in the contract, or it may choose to cease paying, and forfeit its option. It now has possession under an option, but it has no lease, and certainly has no title, much less an exclusive title. The complaint shows no cause of action, and the injunctional order should have been dissolved.

By the Court.— Order reversed, and action remanded with directions to dissolve the temporary injunctional order.

A motion for a rehearing was denied March 16, 1897.

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GILCHRIST, Respondent, vs. FOXEN, imp., Appellant.

February 5 — March 16, 1897.

Deed, conditions subsequent: Foreclosure of mortgage, rights acquired by: Re-entry for condition broken: Merger.

1. Recitals in a deed, showing that the consideration thereof was the payment by the grantee of a small mortgage and the support of the grantor during life and her decent burial when dead, constitute conditions subsequent, for a breach of which the grantor may re-enter and take possession, and will thereupon become re-vested with the title.
2. Every person acquiring any right, title, or interest, by deed, mortgage, or otherwise, in premises conveyed by a deed, which has been duly recorded, containing such recitals, takes subject to them, and the rights of the grantor are paramount.
3. Even though the grantor in such a deed is made a party to an action to foreclose a mortgage given by his grantee, his rights cannot be affected by the judgment therein. The provision of sec. 3169, R. S., that a judgment in foreclosure shall be "a bar to all claim, right or equity of redemption in the mortgaged premises against the parties to the action, their heirs," etc., must be understood as referring to such rights and interests as were or might properly have been litigated in the foreclosure action, and not to such as are paramount.
4. The holder of a mortgage which is subject to the paramount rights of the grantor of the mortgagor may foreclose the same and sell the premises under the judgment for the purpose of perfecting his title of record, notwithstanding he may have obtained a deed of the paramount title, and his rights as plaintiff in the foreclosure action will not become merged in his legal title. Yet, as a condition of relief against the purchaser at the foreclosure sale, he may properly be required to pay back the money received on such sale, with interest.

PINNEY, J., dissents.

APPEAL from a judgment of the circuit court for Portage county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

This is a bill in equity to compel the defendants to release to the plaintiff all claims to the real estate described, and to quiet the plaintiff's title to the same. The facts appearing of

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record are to the effect that on and prior to August 31, 1885, the defendant Magdalena was the owner in fee simple and in possession of the lands described. She was then a widow, and old and infirm. August 31, 1885, Magdalena, by warranty deed, conveyed said lands to her daughter Augustina Shopinski. Said deed recited that the consideration for the conveyance was "(1) payment of a note and mortgage of $150 to Martin Jazdziewski, and (2) the support of the party of the first part (Magdalena) in good manner during her life, and decent burial when dead." Said deed was recorded on the day and year last mentioned. The grantee in that deed (Augustina), with her husband, August 3, 1887, with the knowledge and acquiescence of Magdalena, conveyed to one Leon Cesinski a part of said premises, for the purpose of paying said $150 note and mortgage, and that deed was recorded August 3, 1887. May 9, 1889, said Augustina and her husband executed and delivered to the plaintiff their note and mortgage on the premises for $200, loaned to them by the plaintiff, which mortgage was duly recorded on the same day. October 3, 1890, Augustina and her husband executed and delivered to the plaintiff a second mortgage on the same premises, for $100, then and there loaned by the plaintiff to them, which last mortgage was duly recorded October 4, 1890. Magdalena lived on said premises with Augustina and her husband continuously down to October 10, 1890, when Augustina died, and Magdalena continued to live there with her son-in-law, Carl Shopinski, until October, 1891. In October, 1891, a large amount of interest being due on said notes and mortgages, and unpaid, the said Carl Shopinski sold and converted all his personal property into money, and absconded from the state, leaving Magdalena on said premises for two months in sole possession thereof, and in a destitute condition, compelled to rely upon the charity of her neighbors for support. In February, 1892, she was compelled to go and live with relatives in Chicago.

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April 19, 1892, the plaintiff began proceedings to foreclose his two said mortgages, and then ascertained for the first time that his said mortgages were subject to the prior title of Magdalena. Magdalena was made a party defendant to said foreclosure suit, together with Carl Shopinski, and service was made on them by publication. Carl could not be found, and Magdalena made no answer. In April, 1892, the plaintiff, finding the premises and the house thereon vacant and unoccupied, took possession thereof, by placing John Kosmatka, a tenant, thereon; that in the latter part of May, 1892, Magdalena returned from Chicago, and demanded possession of the premises from said Kosmatka, and the plaintiff, being advised of the prior rights and title of Magdalena, and that the same would not be cut off by such foreclosure, then and there surrendered possession to Magdalena, and the said Kosmatka attorned to and paid the rent to Magdalena from that time down to November, 1892. July 12, 1892, judgment was rendered in said action in the usual form of a judgment of foreclosure and sale, and was entered of record July 20, 1892, and it was therein adjudged that $521.84 were due to the plaintiff from said Carl Shopinski.

In September, 1892, Magdalena, being then and there in possession of the premises, retained counsel to protect her rights therein, and November 5, 1892, began an action in the circuit court in her name against Carl Shopinski, and Eva Shopinski, minor heir at law of Augustina, and the plaintiff herein, and said Kosmatka, for the purpose of asserting the prior title of said Magdalena, and for the purpose of divesting all the rights, title, and interest therein of the defendants in that suit, including the plaintiff herein. As the court found, her counsel, well knowing that said foreclosure proceedings did not in any manner affect or foreclose her rights therein, but, on the contrary, understood that a separate action could be maintained by her, as was commenced, to enforce and protect her rights under and by vir-

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tue of said deed from her to Augustina, dated August 31, 1885, advised Magdalena, and she, in accordance with their advice, November 16, 1892, executed and delivered to this plaintiff a certain warranty deed of said premises, in consideration whereof the plaintiff then and there paid to her $300, and accepted such deed, and the same was duly recorded November 17, 1892. At the same time, it was stipulated and agreed between them that the suit commenced by Magdalena be discontinued and settled, and the possession of said premises was then and there surrendered to the plaintiff, by then and there directing Kosmatka, tenant in possession under her, to attorn to the plaintiff, and that said tenant did then and there attorn to the plaintiff, who, in the afternoon and on the same day, rented and leased the premises to Kosmatka, who remained in possession as a tenant of the plaintiff until he was ousted by the writ of assistance on the said foreclosure sale in March, 1894. December 13, 1892, the defendant Carl Shopinski conveyed the premises to the defendant Malick by warranty deed, duly executed and delivered, and duly recorded on that day, in consideration of $150.

In the spring of 1893, Malick moved, upon affidavits, to set aside said judgment of foreclosure and sale, but the motion was wholly denied in July, 1893. Pursuant to said judgment of foreclosure and sale, said premises were duly sold October 16, 1893, by the sheriff, to the defendant *Foxen*, for $600, and the sheriff's deed thereon was duly executed and delivered to said *Foxen* on that day, and by him duly recorded. October 31, 1893, the said sale was duly confirmed by the court. Five hundred and ninety-one dollars and five cents of the amount of said bid was then and there paid to the plaintiff by the sheriff, and the balance of $8.95 was paid by the sheriff into court. The defendant *Foxen* was not present at the time of said sale, and was not and did not intend to become a purchaser at said sale, but re-

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ceived the sheriff's deed for the purpose of securing a loan of $600 made to the lawyer who bid off the same in his name for himself and others, and who knew all the facts mentioned.

April 26, 1894, the plaintiff commenced this action against said *Foxen*, Carl Shopinski, Magdalena Jazdziewski, and Charles U. Malick for the purpose mentioned. The complaint and *lis pendens* were filed therein April 25, 1894. The defendant *Foxen* answered by way of admissions, denials, and counter allegations. At the close of the trial, the court found, in effect, the facts stated, and that the parties to the deed of August 31, 1895, intended thereby to create, and did create, a condition subsequent, and that, in the event of a breach of such condition by the grantee (Augustina), the said conveyed lands thereupon reverted to the grantor, Magdalena; that Magdalena intended to, and did, by and through her act of demanding and securing possession of the premises, enter upon said land, as and for condition broken, pursuant to the conditions in the deed from her to Augustina, and that she was in the sole, actual, and undisputed possession of the premises from May, 1892, down to November, 1892, as and for condition broken, as aforesaid, and that her taking such possession had that effect; that neither said Carl nor any other person or persons representing or pretending to represent the said Augustina had contributed to the support of the said Magdalena; that the value of the premises in 1892 and at the time of the trial hereof was about $1,100.

As conclusions of law, the court found, in effect, that the several parties claiming under Augustina were bound and held to the knowledge of the lawyer who so bid in the property at the foreclosure sale; that the purchaser at said foreclosure sale acquired, and could acquire, no greater rights than were obtained by the plaintiff by virtue of said mortgages; that the lawyer so bidding in the premises at the foreclosure sale admits a knowledge at the time of said sale of the equities of the plaintiff with reference thereto; that the deed

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from Magdalena to Augustina was given on the sole consideration of maintenance and support, which was a condition subsequent for the breach of which the grantor, Magdalena, could and did re-enter said premises, and become vested as and of her former title in fee simple absolute; that November 16, 1892, the plaintiff acquired the absolute title to the premises in fee simple, by virtue of the deed from Magdalena, executed and delivered to him on that day, and went into immediate possession of said premises thereunder; that there was no merger of the title or interest acquired by the plaintiff in the lands by said mortgages from Carl and Augustina in said absolute title conveyed to the plaintiff by Magdalena, and that the plaintiff is entitled to equitable relief in so far as to keep said interest so acquired separate and distinct; that it was the plaintiff's equitable right to proceed with the sale of the premises pursuant to the judgment of foreclosure and sale, for the purpose of perfecting his title to said premises of record; that the plaintiff is entitled to a judgment for equitable relief quieting the title to said premises as against the claims of the defendants and all persons claiming under, by, or through them, upon his paying into court said $591.05, with legal interest from the receipt thereof by him down to May 27, 1894, and to judgment confirming his title in fee simple to said premises; and that he be put into possession thereof in and by virtue of the judgment to be entered herein in favor of said plaintiff, and against said defendants; and that the judgment herein should command and direct *Foxen* to execute and deliver a quit-claim deed of the premises in due form, so as to entitle it to be recorded, to the plaintiff, and that the plaintiff be let into possession of the premises, and that each and every one of the parties to this action who may be in the possession of the premises, either by himself, agent, servant, or tenant, and every other person who since the filing of such notice of the pendency of this action has come into possession of

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the same, or any part thereof, under them or either of them, deliver to the plaintiff, his heirs or assigns, possession thereof, and the plaintiff is entitled to a writ of assistance for that purpose, if necessary, which judgment is to be with costs and disbursements to be taxed in his favor and against *Foxen*.

From the judgment entered thereon accordingly, the defendant *Foxen* brings this appeal.

For the appellant there was a brief by *Raymond, Lamoreux & Park*, and oral argument by *B. B. Park*. They contended that the claimed condition in the deed from plaintiff's grantor to her daughter was simply a statement of the nature of the consideration, inserted after the description of the premises, and there was nothing in the deed itself, or in the evidence, to show that any condition was intended. *Strong v. Doty*, 32 Wis. 381; *Horner v. C., M. & St. P. R. Co.* 38 id. 165, 173; *Bogie v. Bogie*, 41 id. 209; *Wier v. Simmons*, 55 id. 637; *Lyman v. Babcock*, 40 id. 503; *Morse v. Buffalo F. & M. Ins. Co.* 30 id. 534; *Lawe v. Hyde*, 39 id. 345; *Donnelly v. Eastes*, 94 id. 390. The plaintiff's grantor had no legal title,— nothing but a personal right, enforceable only in equity,— to a cancellation of the deed to her daughter. *Webber v. Quaw*, 46 Wis. 118; *People ex rel. Stanton v. Tioga C. P.* 19 Wend. 73; *Noonan v. Orton*, 34 Wis. 259; *Meech v. Stoner*, 19 N. Y. 29. If there was a condition in that deed, only the grantor could take advantage of it. *Bangor v. Warren*, 34 Me. 324; *Underhill v. S. & W. R. Co.* 20 Barb. 456; *Nicoll v. N. Y. & E. R. Co.* 12 id. 460; *Hayward v. Kinney*, 84 Mich. 591; *Norris v. Milner*, 20 Ga. 563. The deed to plaintiff simply extinguished his grantor's claim on the land for her support. He could not hold paramount title under it separate from his title under his mortgages. Having procured the judgment of foreclosure and the sale under it, and having received the money, he is estopped from claiming that the sheriff's deed does not convey the whole title. *Kaehler v.*

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Dobberpuhl, 60 Wis. 256; *Carter v. Smith*, 23 id. 497; *Williams v. Stevens Point L. Co.* 72 id. 487; *Field v. Doyon*, 64 id. 560.

For the respondent there was a brief by *Brennan, Synon & Frost*, and oral argument by *John H. Brennan*.

CASSODAY, C. J. 1. The deed from the mother (Magdalena) to her daughter (Augustina), delivered and recorded August 31, 1885, contains provisions that it was given in consideration of the payment by the daughter of the prior mortgage on the premises of $150, and the support by her of her mother, "in good manner during her lifetime, and decent burial when dead." Such being the express provisions of the deed so on record, it is very obvious that every person acquiring any right, title, or interest in the premises, from, through, or under the daughter, or her husband, or both, by deed, mortgage, or otherwise, necessarily took and received the same subject to those provisions contained in the deed. *Schwallbach v. C., M. & St. P. R. Co.* 69 Wis. 292. It was there held that "the recording of a deed is constructive notice of its existence and contents to all subsequent purchasers of the land, and renders them subject to whatever covenants therein run with the land."

2. It necessarily follows that the two mortgages executed by the daughter and her husband to the plaintiff were both subject to such provisions in the deed. This being so, the foreclosure of such mortgages by this plaintiff did not have the effect to cut off, nor in any way impair, such paramount rights secured to and reserved by Magdalena in her deed to her daughter, notwithstanding she was made a defendant in such foreclosure suit. *Strobe v. Downer*, 13 Wis. 10; *Straight v. Harris*, 14 Wis. 509. There is nothing in the record to show and there is no claim that the complaint in the foreclosure suit made any attack upon such prior and superior

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right of Magdalena, so secured and reserved in her deed. The service upon her was by publication, and she did not answer nor appear in the case. The statute declares, in effect, that, upon such foreclosure and sale and the confirmation thereof, the sheriff's deed "shall vest in the purchaser all the right, title, and interest of the mortgagor, his heirs, personal representatives, and assigns, in and to the premises sold, and shall be a bar to all claim, right, or equity of redemption therein, of and against the parties to such action, their heirs and personal representatives, and also against all persons claiming under them subsequent to the filing of the notice of the pendency of the action in which such judgment was rendered." R. S. sec. 3169. This statute "must be understood as referring to such rights and interests as were or might properly have been litigated in the foreclosure action." *Pelton v. Farmin*, 18 Wis. 222. The result of the decisions of this court is to the effect that a defendant's prior and paramount right or title to the mortgaged premises cannot be properly determined in a foreclosure suit. The object of a foreclosure suit is not to try the titles alleged to be paramount to that of the mortgagor. If the party made defendant, as claiming some interest subsequent to the mortgage, claims no such interest, he should disclaim, and the suit should be dismissed as to him. The setting up of a paramount title by such defendant is no answer to the allegations made against him; and, if the plaintiff does not choose to litigate such alleged title in the foreclosure suit, he may properly raise the objection by demurrer. *Pelton v. Farmin*, 18 Wis. 222; *Roberts v. Wood*, 38 Wis. 60; *Hekla F. Ins. Co. v. Morrison*, 56 Wis. 133; *Cook v. Goodyear*, 79 Wis. 611. From these authorities it is very clear that, even had such provisions in the deed been fully complied with, yet that the defendant *Foxen* would not, by virtue of such sheriff's deed, have acquired any of such prior and paramount right and

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title so secured and reserved to Magdalena in her deed to her daughter, unless he acquired the same by virtue of a merger of the title hereinafter to be considered.

3. But it stands admitted that such provisions in her deed were never complied with. On the contrary, neither the daughter, nor her husband, nor any one in their behalf, ever paid any part of the outstanding note and mortgage of $150 upon the premises, which, by the terms of the deed, they were to pay as a part of the consideration for the purchase; and so, August 3, 1889, the daughter and her husband, with the knowledge and acquiescence of the mother, conveyed away a portion of the land for the purpose of making such payment. In other words, they were thereby permitted to use a part of the land to pay such debt, and thereby diminish and lessen the security reserved in the deed from Magdalena to her daughter, without parting with anything of any value which they had not so received from the mother. In addition to such failure to pay that mortgage, it appears from the record that after the daughter had been dead for a year, and in October, 1891, the son-in-law, who had become badly indebted, sold and converted all his personal property into money and absconded from the state, leaving Magdalena the sole occupant of the premises and the dwelling house thereon; that after she had remained in the sole possession of the premises for two months, and in a destitute condition, and compelled to rely upon the charity of her neighbors for support, she was, in February, 1892, compelled to go and live with relatives in Chicago; that the plaintiff, finding the premises vacant and unoccupied, took possession in April, 1892, and placed a tenant in charge thereof; that, about a month after that, Magdalena returned from Chicago and demanded possession from such tenant, and the plaintiff, under the advice of counsel as to her prior and superior rights under her deed, surrendered such possession to Magdalena, and caused his tenant

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to attorn to and pay rent to her from that time down to November, 1892; that, pursuant to the advice of her counsel (who was the same person who subsequently bid in the premises on the foreclosure sale in the name of the defendant *Foxen*), Magdalena did, November 5, 1892, commence the action mentioned in the foregoing statement, to divest all claim of right, title, or interest of any of the defendants therein, including this plaintiff; that November 16, 1892, Magdalena, under advice of her said counsel, settled that suit with the plaintiff, by his giving her $300, for which she gave him a warranty deed of the premises, and surrendered the possession thereof to him, as stated.

The question recurs whether the clause in the deed from Magdalena to her daughter, mentioned, was a condition subsequent, and, if so, whether such failures to perform, and such absconding of her son-in-law, and her exclusive possession for two months in 1892 and six months in 1893, and the suit to enforce her title as owner, and the settlement of the same, as mentioned, operated to reinvest the legal title to the property in her, the same as it was before she conveyed to her daughter. It will be observed that the deed of August 31, 1885, from Magdalena to her daughter, was not signed by the daughter, nor by any one but Magdalena. Nor does it contain any agreement on the part of the daughter to support her mother during her life, or for any time, or to bury her when dead. Nor does it contain any agreement on the part of the daughter, unless it may be said that, by accepting the deed, she assumed the payment of the $150 mortgage therein mentioned; but that can hardly be claimed, since it is merely mentioned as part of the consideration. The case is therefore distinguishable in this respect from *Bogie v. Bogie*, 41 Wis. 209; *Bresnahan v. Bresnahan*, 46 Wis. 385; *Morgan v. Loomis*, 78 Wis. 594; *Beckman v. Beckman*, 86 Wis. 655; *Donnelly v. Eastes*, 94 Wis. 390. Accordingly, it has been held that, "in a voluntary conveyance,

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words may be held to be a condition, which, if used in a conveyance made for a valuable consideration, would be held a covenant only." *Horner v. C., M. & St. P. R. Co.* 38 Wis. 174. In that case it was held, in effect, that, as the language of the deed showed that the grant was solely for depot and other railroad purposes, it "must be construed as stating conditions subsequent." Page 177. So, it was held in that case that "it is not essential to a valid condition that, in case of a breach thereof, a right of re-entry be expressly reserved in the deed, or that it be expressed therein that the estate of the grantee shall terminate with a breach of the condition." Page 173. To the same effect: *Drew v. Baldwin*, 48 Wis. 529; *Blake v. Blake*, 56 Wis. 392; *Delong v. Delong*, 56 Wis. 514; *Pepin Co. v. Prindle*, 61 Wis. 301, 305; *Cross v. Carson*, 8 Blackf. 138; *S. C.* 44 Am. Dec. 742; *Wilson v. Wilson*, 38 Me. 18; *S. C.* 50 Am. Dec. 227. In *Blake v. Blake*, *supra*, it satisfactorily appeared that the "deed which had been destroyed contained conditions that the grantee should reside with his parents, the grantors named therein, on the lands, and should work and improve the same, and that he should support his parents during their lives," and that the grantee should pay $200 to one of his sisters therein named; and it was held that such conditions were "conditions subsequent, within the rules in the *Horner Case*," *supra*, "and that Alanson Blake substantially re-entered upon the premises, for conditions broken, when the plaintiff left him, and he assumed exclusive control of the whole premises in 1868; . . . that a condition the breach of which is good ground in equity for canceling the conveyance of which it is a part is a condition subsequent, unless there is something in the instrument to show that such a condition was not intended." In *Delong v. Delong*, *supra*, "parents conveyed lands to their son and his wife, subject to, and for no other consideration than, certain conditions expressed in the conveyance, intended to secure the means for the sup-

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port and maintenance of the grantors, and to provide for the distribution of their estate after their death. *Held*, that such conditions were not mere covenants, but were conditions subsequent, upon a breach of which the grantors might re-enter upon the lands." From these adjudications it logically follows that the clause in the deed from Magdalena to her daughter constituted a condition subsequent, for the breach of which Magdalena lawfully re-entered, and that the legal title thereupon became lawfully revested in her. That title she conveyed to the plaintiff by warranty deed, which was duly recorded November 17, 1892, as stated.

4. The question recurs as to whether his rights, by virtue of his being plaintiff in the judgment of foreclosure and sale of the two mortgages mentioned, became merged in his legal title so acquired from Magdalena by the deed last mentioned. We are clearly of the opinion that they did not. The plaintiff had the right, in equity, notwithstanding his deed of the legal title, to sell the land on the foreclosure judgment, for the purpose of perfecting his title of record. *Morgan v. Hammett*, 34 Wis. 514; *Aiken v. M. & St. P. R. Co.* 37 Wis. 469; *Scott v. Webster*, 44 Wis. 185. But it is manifest that no substantial right to the land passed by the sheriff's sale and sheriff's deed to the defendant *Foxen;* and hence the court very properly compelled the plaintiff, as a condition of the relief granted, to pay into court the money received by him on such sale, with interest, as adjudged.

By the Court.— The judgment of the circuit court is affirmed.

PINNEY, J., dissents.

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BEHL, Appellant, vs. SCHUETTE and another, Respondents.

February 23 — March 16, 1897.

New trial: Terms for opening default.

Upon setting aside a judgment entered by default, and granting a new trial, under sec. 2832, R. S., on the ground of mistake or excusable neglect, the circuit court may properly impose upon the moving party the payment of the reasonable expenses incurred by the adverse party, which he would lose by the opening of such judgment, but not such as were unnecessary or excessive, though actually incurred.

APPEAL from an order of the circuit court for Columbia county: R. G. SIEBECKER, Circuit Judge. *Reversed.*

This was an action on a promissory note for about $250, to which defendants pleaded a counterclaim of about $100. At the December term of the circuit court for 1895, held at Portage City, in Columbia county, Wisconsin, commencing on the 3d day of the month, the cause was on the calendar for trial. It was reached in its order on the 12th. Defendants, with their attorneys and witnesses, were in court ready for trial. Neither plaintiff nor his attorneys were present. Defendants' attorneys waived a jury, proved their counterclaim before the court, and took judgment thereon for $116.25 damages and $201.52 costs. Seasonably thereafter plaintiff's attorneys moved the court to set such judgment aside and grant a new trial, upon the ground of excusable neglect. Such motion was based on affidavits to the effect that plaintiff and his attorneys resided in the city of Milwaukee; that one of such attorneys, C. W. Briggs, attended court on the first day of the term, and had the case set down for trial on the 17th day of December, 1895, with the understanding, as he supposed, that if all the jury cases were disposed of before that time, and the parties were not in court ready for trial,

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the case would be continued for the term; that on the next day he so notified his associate and the plaintiff; that plaintiff relied thereon, and did not know to the contrary till late in the evening of the 11th of December, 1895, when he was notified by Mr. Briggs that the case would be reached the next day or day after; that upon receiving such notice he started as soon as practicable for Portage, with his witnesses, and arrived there about 2 o'clock p. m. the next day; that judgment was taken shortly before he arrived; that plaintiff intended in good faith to be present with his witnesses and attorneys in time to try the case, and would have been had it not been for the misleading information given to him by his attorney Mr. Briggs. The moving papers contained an affidavit of merits. In opposition to the motion were affidavits and papers to the effect that the case was set down for trial, pursuant to a written stipulation, at the foot of the calendar; that the order of the court recorded on the clerk's journal was to the effect that the cause would be tried on the 17th or sooner, when reached at the foot of the calendar; that the case was called pursuant to such order, and disposed of regularly by proof being taken of defendants' counterclaim, and judgment being entered accordingly by the order of the court; that defendants were in attendance with their witnesses, attorney, and counselor, ready for trial, several days before the case was reached, and that they paid to such attorney for three days' attendance $75, and to such counselor for three days' attendance $75; that they also paid $50 for witness fees, $24.50 for sheriff's fees, $14.75 for clerk's fees, and $2.25 for telephone and postage. The motion to set aside the judgment and for a new trial was granted upon terms that plaintiff pay to defendants the several sums of money expended by them as aforesaid. Plaintiff excepted to the terms imposed, and appealed from the order in that regard.

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For the appellant there was a brief by *D. J. Dalton* and *C. W. Briggs*, and oral argument by *C. W. Briggs*.

For the respondents the case was submitted on the brief of *George W. Sloan*.

MARSHALL, J. It sufficiently appears that the failure of the plaintiff to be present with his witnesses and attorneys in time for the trial was wholly on account of his being misinformed of the conditions of the order setting the case for such trial. Under the statutes providing for the relief of a party from the consequences of mistake, inadvertence, surprise, or excusable neglect (sec. 2832, R. S.), a party may properly be held excusable for the negligence of his attorney, and be relieved from such negligence on proper terms. *Whereatt v. Ellis*, 70 Wis. 207; *Hanson v. Michelson*, 19 Wis. 499; *Flanders v. Sherman*, 18 Wis. 576. Such was the conclusion of the learned trial judge, and on the record the case was an ordinary one, calling for such relief upon reasonable terms. There is no arbitrary rule by which the terms for opening a default in such a case can be fixed. The power in the matter is of a purely discretionary character, and should be exercised, not harshly, but with sound judgment, in such manner as to do justice between the parties so far as that end can be practically attained. Obviously the court must be governed by the principle that a party circumstanced as plaintiff was should bear the consequences of his own fault, rather than that the diligent party should suffer. To that end it was proper that the plaintiff should be required to pay the reasonable expenses incurred by the defendants, which they would lose by opening the judgment. But the court should not have gone further than to require the moving party to pay such reasonable expenditures, and could not without overstepping the bounds of legal discretion. *Union Nat. Bank v. Benjamin*, 61 Wis. 512.

It follows from the foregoing that the question involved

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here is not solely whether the defendants incurred the large bill of expenses which the court required plaintiff to pay as a condition of relief from the judgment, but whether such expenses, under all the circumstances, were reasonable. The cause of action was one on contract for a small amount of money. It evidently involved no intricate questions of either law or fact. Upon what ground it can be held that the presence of an attorney and a counselor as well was necessary in order to try such a case is not perceived. Evidently the learned circuit judge understood the rule to be that the party seeking relief must make the opposite party good for all his expenditures incurred in obtaining the judgment, without reference to whether such expenses were reasonable or not. That was erroneous. The amount should have been limited to reasonable expenses. For such a simple case as this appears to have been, in our judgment the sum of $15 per day for attorneys' and counselors' fees was ample. The other items which the court required to be paid were taxable costs, and, though they appear very large, there is nothing before us by which we can determine whether they were properly taxed or not. Therefore the only modification we can make in the order is to require the amount of attorneys' and counselors' fees to be reduced to $15 per day for the three days, making the total sum to be paid by plaintiff, as a condition of setting aside the judgment and granting a new trial, $136.55.

By the Court.— That part of the order of the circuit court appealed from is reversed, and the cause remanded with directions to modify such order in accordance with this opinion.

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AGNEW, Appellant, vs. FARMERS' MUTUAL PROTECTIVE FIRE INSURANCE COMPANY OF THE TOWNS OF MEDINA, YORK, SUN PRAIRIE & DEERFIELD, COUNTY OF DANE, STATE OF WISCONSIN, Respondent.

February 23 — March 16, 1897.

Insurance: Evidence in action on policy: Instructions: Waiver.

1. Where the defense to an action on a policy of fire insurance is that the plaintiff set the fire which consumed his property a wide range of circumstances may be given in evidence, tending to show the whereabouts of the plaintiff at the time of the fire, and what motives might have induced him to set the fire.
2. A mutual insurance company cannot be held to have waived the defense pleaded by it to an action on its policy, that the plaintiff therein set the fire which consumed its property, by the mere inadvertent act of its secretary in sending a notice of a general assessment to such plaintiff while the action was pending.
3. In an action where the evidence is circumstantial, its effect is to be determined by the jury, and it is not error for the court to refuse to instruct them that there is no evidence to establish a certain fact.
4. For the court to state in its charge in such action that the only issue for the jury is whether the plaintiff set or caused to be set the fire which consumed his buildings, and that all other matters claimed in the complaint stand admitted as true if the plaintiff is entitled to a recovery, cannot prejudice the plaintiff.
5. It was not error for the court to state in its charge what the defendant claims as to the plaintiff's motives in purchasing the insured property, and that "whether he was actuated by such motives is a disputed fact. He denies it. It is for you to determine whether such facts existed."
6. It was not error for the court to refuse to charge, as requested by plaintiff, that the defense must be established by a preponderance of the evidence *given in court*, where that point was fully covered by the general charge.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

The case is fully stated in the opinion.

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For the appellant there was a brief by *G. W. & H. S. Bird*, and oral argument by *G. W. Bird*. They contended, among other things, that there was error in the rulings of the court, both in admitting and in excluding evidence, for which the judgment should be reversed. The defendant's counsel having in his closing argument, to which the plaintiff's counsel had no opportunity to reply, assumed and claimed that a certain fact was established, of which there was no proof, it was error for the court to refuse to charge, as requested by plaintiff, that there was no proof of that fact. *Brown v. Swineford*, 44 Wis. 282, 290; *Elliott v. Espenhain*, 59 id. 272, 277; *Bremmer v. G. B., S. P. & N. R. Co.* 61 id. 114, 118; *Baker v. Madison*, 62 id. 137; *Hanawalt v. State*, 64 id. 84, 88; *Heddles v. C. & N. W. R. Co.* 74 id. 239, 251; *Carey v. C., M. & St. P. R. Co.* 61 id. 71, 76; *Hardy v. Milwaukee St. R. Co.* 89 id. 183; *Hall v. U. S.* 150 U. S. 76, 82; *Wilson v. U. S.* 149 id. 60; *State v. McCartney*, 65 Iowa, 522, 525. It was error to refuse the instruction that the verdict must be based upon the evidence *given in court*. *Smith v. C., M. & St. P. R. Co.* 42 Wis. 520; *McCoy v. Milwaukee St. R. Co.* 82 id. 215. The plaintiff had a right to a plain and direct instruction on that point. *Sherman v. Menominee River L. Co.* 77 Wis. 14, 22; *Little v. Superior R. T. R. Co.* 88 id. 402, 408; *Johnson v. Superior R. T. R. Co.* 91 id. 233. The defendant waived its defense based on a forfeiture of the policy by giving notice of an assessment. *Stylow v. Wis. O. F. M. L. Ins. Co.* 69 Wis. 224; *Oshkosh Gas Light Co. v. Germania F. Ins. Co.* 71 id. 454; *Dohlantry v. Blue Mounds F. & L. Ins. Co.* 83 id. 181; *McKinney v. German M. F. Ins. Co.* 89 id. 653; *Dick v. Equitable F. & M. Ins. Co.* 92 id. 46.

For the respondent there was a brief by *R. M. La Follette* and *W. G. Coles*, and oral argument by *G. E. Roe*.

CASSODAY, C. J. It appears from the record, in effect, that the defendant issued a fire insurance policy to one

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G. W. Stiles, September 27, 1890, insuring him against loss by fire of his dwelling house for $1,000, his farm barn for $700, his grain, stock, etc., for $1,200, all situated on the lands described, for a term of five years from September 27, 1890, to September 27, 1895, at noon; that June 1, 1893, Stiles died intestate, leaving a widow, Catherine J., and two children, Frank E. and Clara M.; that the widow and Frank became administrators of the said estate, and settled the same; that April 28, 1894, the plaintiff purchased and became the owner in fee of the lands described by conveyances from said widow and the son and daughter, which were recorded May 12, 1894; that at the time the plaintiff became such owner the vendors agreed, as a part of the transaction, to assign to the plaintiff said policy of insurance, and the same was so assigned accordingly, with the consent of the defendant; that May 29, 1894, said buildings were destroyed by fire; that thereupon the plaintiff complied with all requirements of the policy, but the defendant refused to pay the insurance; that September 27, 1894, the plaintiff commenced this action to recover $1,729, the amount of the loss, with interest. The answer admits, *seriatim*, all the material allegations of the complaint, and then alleges as an affirmative defense that the fire which destroyed the property was wrongfully set, or caused to be set, by the plaintiff, for the purpose of destroying the property and enabling him to procure the insurance. At the close of the trial the jury returned a verdict in favor of the defendant, upon which judgment for $371.55 costs was entered, and from which judgment the plaintiff brings this appeal.

It appears that the premises in question were eight or nine miles north of the village of Marshall; that the plaintiff at the time was about thirty-one years of age, and lived at his father's, about two miles west of Marshall; that the plaintiff returned from Madison on the evening of May 29, 1894, and attended a concert at Marshall with the lady

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whom he expected to marry on the evening of the next day; that the concert closed somewhere between 10 and 11 o'clock; that the fire was discovered, according to the testimony on the part of the plaintiff, shortly after 11 o'clock, and, according to the testimony on the part of the defendant, shortly after 12 o'clock. The plaintiff testified that after the concert was out, and his intended had started for her home, about four and one-half miles southeast of Marshall, in a buggy with her brother, he started to drive his horse and buggy to the premises in question, but that, after proceeding about half a mile, he found that he did not have the key to the Stiles house, and so he turned back, and drove to his father's house, and got into bed just as the clock struck 12, and remained there until 4 or 5 o'clock the next morning. The evidence is voluminous and circumstantial on the part of the defendant, but after careful consideration we think it is sufficient to sustain the verdict.

1. Numerous errors are assigned for the admission of testimony to the effect that a certain witness who had examined certain tracks of a team told other witnesses what he found in respect to such tracks; also in allowing the witness to testify why he and his companions got out of the buggy at particular places, and examined the tracks; also for allowing the defendant to cross-examine one of its witnesses when taken by surprise by his testimony; also in allowing Frank E. Stiles to testify as to the comparative value of the different parts of the farm; also in allowing a witness to testify as to what interest the plaintiff manifested in the examination of the tracks; also in allowing a witness who lived one block from the hall where the concert was held, and who had been in bed fifteen or twenty minutes before he heard the crowd coming from the concert, to state that, judging from the time he went to bed, he should think it was about 10 o'clock when the concert was out that evening; also in allowing a witness to testify as to what the plaintiff had offered

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to take for the land, and particularly a certain forty, before and after the fire; also in not sustaining an objection to a question put to the plaintiff on cross-examination as to whether he had not stated to a person named, three or four days after the fire, that he could not have been at the premises at the time of the fire because he had driven three miles and a half south of Marshall that same night; also in not sustaining an objection to a question put to the plaintiff on cross-examination as to whether he called the attention of a certain witness to the fact that he could not find any tracks leading out of the barn yard while at the barn yard. Some of these circumstances, taken by themselves, would seem to be without any significance, but, when taken in connection with other facts and circumstances which the evidence tended to prove, they may have had more or less bearing upon some of the questions suggested, as to the time when the concert closed and the fire was first discovered, as to the whereabouts of the plaintiff between the time of the concert and the fire, as to the connection between the tracks discovered and those which may have been made by the plaintiff's agency, or as to the conduct, statements, and appearance of the plaintiff in respect to the tracks and the fire, and his motive for burning the property. The evidence in such a case must, necessarily, take a broad range. But reversible error must "affect the substantial rights of the adverse party," and we fail to find any such errors in the rulings thus made. R. S. sec. 2829.

2. The same may be said of the ten errors assigned for the rejection of testimony. As, for instance, one witness on the part of the defendant testified that when he discovered the fire he looked at the clock, and it was ten or fifteen minutes after 12; that the barn was then nearly burned down, all consumed but the posts and the frame; and that the house was on fire. We perceive no error in rejecting a question put to that witness on cross-examination, as to how

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long, in his judgment, the fire had been burning when he first saw it, and also whether he had not stated to certain parties named that from what he saw he should judge the fire commenced about half past 11. Other testimony rejected was as to whether there were three single places for horses to stand in at *Agnew's* barn, to which the court said he had just answered that he would not call them stalls; also as to the time which elapsed after the witness left the plaintiff that night and when he went to bed; also as to whether a witness had any further conversation with another witness in June, 1894; also as to the condition of the buggies at *Agnew's* barn when the witness examined them; also as to what the witness then said as to the length of time which had elapsed, apparently, since the double buggy had been out; also as to whether, after examining the horses' feet at *Agnew's* barn, he stated that they did not correspond with the tracks; also as to where the plaintiff was living in May, 1894, which, according to the statement of the court, he had answered two or three times before; and also as to the conversation of one witness with another witness as to the time when the fire commenced, and as to having told still another witness. We cannot undertake to give reasons for each and all of such several rulings. It is enough to say that some of such exceptions are trivial, and each and all of such rulings may be fairly sustained upon well-established and familiar principles of law. The trial court necessarily has a wide discretion in such matters, and we perceive no abuse of such discretion.

3. There was no error in refusing to instruct the jury that there was no testimony showing or tending to show that the plaintiff had arranged with anybody to have a team waiting anywhere to go or take him to the Stiles farm to set or cause the fire to be set, and that they could not base their verdict on any such supposition or surmise. Such instruction called upon the court to determine the effect of the cir-

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cumstantial evidence in the case, and to hold, as a matter of law, that there was no evidence tending to prove the fact stated.

4. There was no error in refusing to instruct the jury that their "verdict must be according to the weight of *the evidence given in court*," and that they could only find such a verdict as should be supported by the evidence. There is no pretense that there was any evidence except such as was given in court. The court charged the jury that the burden of establishing the defense rested upon the defendant, and that "it must be established by a fair preponderance of the evidence;" that unless "the evidence preponderates to establish" the defense, their verdict must be for the plaintiff. This necessarily refers to the evidence given in court on the trial, and hence covers the request. *Stilling v. Thorp*, 54 Wis. 536, 537.

5. There was no error in refusing to instruct the jury that "About October 21, 1895, defendant made and notified plaintiff of an assessment upon his policy for losses occurring since October 29, 1894. By so doing defendant waived and estopped itself from insisting upon the affirmative defense set up in its answer, and your verdict must be for the plaintiff for the full amount claimed." At the time mentioned in the request the suit had been pending for a long time, and was at issue. The notice of the assessment seems to have been inadvertently sent out by the defendant's secretary in making a general assessment, and we cannot hold that it took away and destroyed the defense which had long before been set up in the answer in the case. It is unlike the very numerous class of cases, some of which are cited by counsel for the plaintiff, where, after the forfeiture of the policy by reason of the breach of some condition therein, the company waives the forfeiture by insisting upon the enforcement of its provisions. The defense here is not based upon any condition contained in the policy, but upon

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a fact existing outside of the policy, to the effect that the plaintiff intentionally burned his own buildings for the purpose of obtaining the insurance.

6. After stating in the charge that the only issue for the jury to determine was whether the plaintiff set fire or caused fire to be set to the buildings in question, the court further stated that "All other matters claimed in the complaint stand admitted as true, if the plaintiff is entitled to recovery." That statement contained nothing prejudicial to the plaintiff. On the contrary, it states just what he claims.

7. There was no error in charging the jury that "The defendant company claims in this case that the plaintiff was actuated by a motive of gain, in that he had purchased this property whereon these buildings were situated for the purpose of speculation, that is, for the purpose of making money by such purchase and the sale of it again, and that he determined that if he could collect the insurance on those buildings, and then sell the land, he would then gain by such transaction a considerable sum of money. Whether or not the plaintiff was actuated by any motive of that kind is a disputed fact. He denies it. It is for you to determine whether any such fact existed." This stated just what the defendant claimed. It further stated that whether the plaintiff was actuated by any such motive was a disputed fact; that he denied it; that it was for the jury to determine whether any such fact existed.

The claim that the verdict is not supported by the evidence has already been disposed of.

By the Court.— The judgment of the circuit court is affirmed.

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POMEROY, Appellant, vs. HEDDLES and others, Respondents.

February 23 — March 16, 1897.

Appeal, determination of.

1. Findings of fact will not be disturbed on appeal, if supported by the evidence.
2. A judgment in an equity case will not be reversed because of the rejection by the trial court of record evidence, where the record so rejected is returned with the bill of exceptions and can therefore be considered by the appellate court.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

The case is fully stated in the opinion.

For the appellant there was a brief by *Richmond & Smith*, and oral argument by *J. B. Smith.* They claimed that the evidence clearly showed a highway, dedicated, accepted, and used, over ground where defendants' fence now stands, citing *Nye v. Clark*, 55 Mich. 599; *Rathman v. Norenberg*, 21 Neb. 467; *Bartlett v. Beardmore*, 74 Wis. 485; *Lemon v. Hayden*, 13 id. 159; *Bushnell v. Scott*, 21 id. 451.

For the respondents there was a brief by *Fethers, Jeffris, Fifield & Mouat*, and oral argument by *C. L. Fifield.*

WINSLOW, J. This is an action to have the defendants' highway fence declared to be an encroachment on the highway, and a nuisance specially injurious to the plaintiff, and to have the same removed, and to obtain an injunction against its maintenance in the future. The defendants denied that the fence is an encroachment. It appears that the plaintiff owns forty acres of land on the east side of the alleged highway, and has owned the same since 1870, and the defendant *Catherine* owns twenty acres on the west side of the highway, and opposite the plaintiff's forty. The highway is alleged to be three rods in width. The plaintiff's

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land is in the southeast quarter of a section, and the defendants' land in the southwest quarter of the same section; and, by the descriptions in their title deeds, their lands are bounded by the center line of the section. It is alleged in the complaint that in 1846 the commissioners of highways attempted to lay out a highway three rods in width north and south through the center of the section, but that the proceedings were not in accordance with the provisions of law, so that the road was not a legal highway. It appears, however, that a road was actually opened by the owners on or near the route fixed by the commissioners, and that it has ever since been used. In 1844 or 1845 one Downing purchased and went into possession of the land on both sides of the highway, including the lands now owned by plaintiff and defendants. Prior to 1850 he built a sod fence along the supposed east line of the highway, but none was then built along the west line at the point in controversy. In 1856 Downing sold the land on the west side of the highway (including that now owned by defendants) to one Soverhill, who built a fence along the supposed west line of the highway in 1857, and in 1858 sold a part of the land to Daniel Heddles, deceased, of whom the defendants are devisees.

The locations of these original fences formed the main points of controversy in the case. The plaintiff claimed that the original fence on the west side of the highway was built and maintained for many years upon a line about one rod west of the present location of the defendant's fence, and, hence, that a highway by dedication and user had been made, and the defendant had subsequently encroached thereon by building the present fence. On the other hand, it is claimed by the defendant that the original fence on the west side of the road was substantially on the line of the present fence, and that the plaintiff and his grantors had moved their fences on the east side forward about a rod from the original location thereof. There was testimony to support both

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contentions. It would add nothing to the sum of useful law in the books to attempt to state even the nature of the testimony supporting the opposing claims. It appeared by the testimony of a competent surveyor that the defendant's fence was and is upon a north and south line drawn one and one-half rods west of the true north and south quarter line of the section, and the court found that the owners of lands in the west half of the section never dedicated any further land for the highway than said strip one and one-half rods in width, and, consequently, that the fence was not in the highway. We cannot disturb the findings, because there was ample evidence to support them.

It seems that certain proceedings were had before the town board in 1869 which resulted in an order being made by the board requiring Daniel Heddles to move back the fence then existing, as an obstruction to the highway. It further appears that in 1885 an action in the name of the state was brought against the plaintiff to recover a statutory penalty for obstructing the highway, and in that action judgment was rendered for *Pomeroy*, on the ground that his fence was not an obstruction. The records of both proceedings were offered in evidence and rejected. It is unnecessary to decide whether the rulings were erroneous or not. Both records are returned with the bill of exceptions, and are before us, and therefore may be considered as well as if they had been admitted. Conceding their admissibility, neither of them is so persuasive as to cause us to think that the findings of fact should be reversed.

By the Court.— Judgment affirmed.

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DAVENPORT, Respondent, vs. STEPHENS, Appellant.

February 23 — March 16, 1897.

Cloud on title: Implied trust: Lien of judgment.

1. Where land, purchased for a married woman and paid for out of her separate estate, was, without her knowledge or consent, conveyed to her husband, but was, on her discovering that fact two days later and demanding a deed in her own name, conveyed by her husband to her, *held*, that the deed to the husband conveyed only the bare legal title, and he held merely in trust for his wife, and that the lien of a prior judgment against him did not attach thereto; and that his conveyance to his wife executed the trust and passed the title as of the date of the original deed to him.
2. One who has the legal title to land, whether in actual possession or not, may maintain an action in equity to remove a cloud affecting the title, where the invalidity of the hostile claim cannot be proved by any record, but must be shown by other evidence.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

This is an action to remove a cloud upon the title to land. The plaintiff is a married woman, the wife of Thomas Davenport. The defendant had a judgment, which was duly entered and docketed, against Thomas Davenport. The plaintiff owned a home with about thirteen acres of land. In August, 1895, a real-estate agent negotiated a trade between the plaintiff and one William Keyes, whereby the plaintiff was to convey her home and land to Keyes, and to receive from him some money, a mortgage on the land which she conveyed, and a conveyance of two lots in one of the suburbs of the city of Madison. At the time when the conveyances were to be executed, the plaintiff's husband, Thomas Davenport, attended to represent his wife in the transaction. Through some misunderstanding of the agent, the mortgage and the conveyance of the lots were made to run to Thomas Davenport as mortgagee and grantee, re-

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spectively, instead of running to the plaintiff. The conveyance of the plaintiff's land to Keyes was delivered to Keyes, and the mortgage and conveyance of the lots were left with the agent for the plaintiff. This was on Saturday, August 31, 1895. As soon as the plaintiff learned that the mortgage and conveyance were to her husband as mortgagee and grantee, she refused to accept them, and demanded others, which should be in her name. For some reason it was inconvenient to obtain the execution of new conveyances from Keyes and wife; so it was finally arranged that Thomas Davenport should assign the mortgage, and make a conveyance of the lots to the plaintiff. And so it was done. This was on Monday, September 2, 1895. The defendant claimed that his judgment against Thomas Davenport became a lien upon the lots while the title was vested in Thomas Davenport, and sold the lots on execution. The action is brought to remove this cloud upon the title to the lots. The plaintiff had judgment, from which this appeal is taken.

For the appellant there was a brief by *Spooner, Sanborn & Spooner*, and oral agument by *A. L. Sanborn*. They contended that the evidence shows the delivery of the deed to the husband two days before he conveyed to his wife, and she by accepting a deed from him acknowledged and confirmed his title. Actual possession is necessary to enable a person to maintain an action to remove a cloud on title. There is no evidence that the plaintiff is in possession. *Stridde v. Saroni*, 21 Wis. 173; *Grimmer v. Sumner*, id. 179; *Wals v. Grosvenor*, 31 id. 681; *Lee v. Simpson*, 29 id. 333; *Shaffer v. Whelpley*, 37 id. 334; *Pier v. Fond du Lac*, 38 id. 470; *Grignon v. Black*, 76 id. 674; *Frost v. Spitley*, 121 U. S. 552; *Sepulveda v. Sepulveda*, 39 Cal. 13; *Eaton v. Giles*, 5 Kan. 24.

For the respondent there was a brief by *Bushnell, Rogers & Hall*, and oral argument by *A. R. Bushnell*.

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NEWMAN, J. Whether the defendant's judgment became a lien upon plaintiff's lots depends upon that other question — whether Thomas Davenport ever had sufficient title in the lots for the lien of that judgment to attach to, during the passage of the title through him from Keyes to the plaintiff. No question is made that the plaintiff paid the consideration which was paid for the lots; nor that the conveyance was taken in the name of Thomas Davenport, without her knowledge and consent; nor is her acquiescence shown. On the contrary, she immediately demanded the title to be made to her. It is clear that in that case the conveyance vested in Thomas Davenport no interest in the land. It conveyed to him but the bare legal title, which he held only in trust for his wife. In equity she is regarded as the *real* owner. It is a trust arising by implication of law (2 Pomeroy, Eq. Jur. §§ 1037–1043), and is excepted from the requirements of the statutes of frauds (R. S. secs. 2076, 2079; *Kluender v. Fenske*, 53 Wis. 118; 2 Pomeroy, Eq. Jur. § 1042; *Foote v. Bryant*, 47 N. Y. 544; *Reitz v. Reitz*, 80 N. Y. 538; *Haack v. Weicken*, 118 N. Y. 67). If the trust had been expressed on the face of the deed from Keyes, the statute (secs. 2073–2075) would have executed it at once by vesting the legal as well as the equitable title in the plaintiff. In that case there would have been nothing to which the lien of the defendant's judgment could attach. *Hannig v. Mueller*, 82 Wis. 235. The effect of the voluntary execution of the implied trust by the execution of the deed from Thomas Davenport to the plaintiff was the same. It operated to pass the title to the plaintiff to the same effect as if the trust had been expressed in the deed from Keyes. Whatever title Thomas may be deemed to have had at any time was subject to be defeated and lost by the execution of the trust. Equity would have enforced the trust directly, or, in a proper case, would reform the deed upon which the trust arose so that it should

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declare the trust upon its face, so as to prevent the lien of the judgment. *Sullivan v. Bruhling*, 66 Wis. 472. The voluntary conveyance operates the same effect as the reformation of the deed. It supplies the place of, and is equivalent in law to, a declaration of the trust in the original deed. It relates back to the execution of the original deed, so as to pass title as of that date. *Main v. Bosworth*, 77 Wis. 660. In order to prevent injustice, equity often considers that to have been done which ought, in equity, to have been done. The defendant is in no position to complain. The title of his debtor in the lots was merely nominal. His lien was no more comprehensive than his debtor's title. He is not a *bona fide* purchaser. He has parted with nothing on the faith of the deed as it stood, and is in no position to object to the doing of complete equity between his debtor, the nominal trustee, and the beneficiary of the implied trust. The effect of the whole transaction is that no title to which the lien of defendant's judgment could attach ever rested in Thomas Davenport.

Some question was raised whether the plaintiff has shown such possession as should entitle her to maintain this action. It is entirely immaterial whether she was in actual possession or not. No other person was in the actual possession. One who has the legal title to land, whether in possession or not, may maintain an action in equity to remove a cloud of title upon his land, where the invalidity of the hostile claim cannot be shown by any record, but must be proved by evidence *aliunde*. *Pier v. Fond du Lac*, 38 Wis. 470; *Goodell v. Blumer*, 41 Wis. 436; *Herren v. Strong*, 62 Wis. 223. In this case the invalidity of the defendant's claim could be shown only by evidence *dehors* the record. Sec. 3186, R. S., extends, rather than limits, the jurisdiction of the courts in the cases to which it is applicable. *Fox v. Williams*, 92 Wis. 320.

By the Court.— The judgment of the circuit court is affirmed.

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CURTIS, Administratrix, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

February 24 — March 16, 1897.

Negligence causing death: Instructions: Court and jury.

1. Where, in an action against a railroad company for causing the death of a switchman by its negligence in not keeping a guard rail properly blocked, there was evidence that the defendant was guilty of negligence in that respect, and that in consequence thereof the switchman caught his foot between the guard rail and the track rail, which caused him to fall under the cars, and there was no evidence on which it could be held, as a matter of law, that the deceased assumed the risk or was guilty of contributory negligence, *held*, that the court properly refused to take the case from the jury.
2. It was not negligence *per se* for the deceased to go between the cars while in slow motion, for the purpose of uncoupling them, or to use a stone while walking along to loosen the coupling pin, where that had been a common custom in the switchyard, approved by the yard master, even though he might have signaled the engineer to stop the car and then have taken the pin out without danger; nor did he, by choosing the more dangerous mode, assume the risk of injury resulting, not from that cause, but from the negligence of the defendant in respect to the guard rail.
3. In such action, there being evidence which, if believed, might have sustained a finding that the injuries of the deceased occurred in consequence of his stumbling against the arm of the guard rail and then slipping, it was error for the court to refuse to charge the jury that if the injuries were received in that way the plaintiff could not recover, unless the same point was clearly given in the general charge.

APPEAL from a judgment of the circuit court for Outagamie county: CHAS. M. WEBB, Judge. *Reversed.*

This action was brought by the plaintiff, as administratrix of the estate of her deceased husband, William J. Curtis, to recover, against the defendant, the pecuniary damages sustained by reason of his death, caused, as alleged, by the negligence of the defendant company while he was in its

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employ as yard switchman at Appleton, Wisconsin. It is alleged that, as such switchman, it was the duty of the deceased, among other things, to assist in making up trains and switching cars, and to that end to couple and uncouple them, and that it was the defendant's duty to provide safe and suitable appliances for that purpose, and a safe and suitable place in which to do the same; that at the time, etc., the defendant kept and maintained between the rails of one of its tracks in said city and near to one of its switches, a guard rail, about eight feet long, over and upon which track and guard rail cars were switched, moved, coupled, and uncoupled in doing the defendant's business; that said guard rail was kept and maintained by it in such a careless and negligent manner that the space between the guard rail and the main rail was just wide enough to admit the sole and heel of a boot or shoe, and allow the same to become caught and fastened between said rails, and that said space was negligently and carelessly allowed by the defendant, its agents, etc., to remain without proper or sufficient blocking or protection to prevent the feet of its employees from becoming so fastened therein as aforesaid; that on April 30, 1895, the deceased, while in the line of his said duties, switching and uncoupling cars in the usual manner, and while in the exercise of ordinary care on his part, was caught and firmly held in said space by his left foot unavoidably slipping into the same, firmly holding the deceased therein upon and between the tracks in such a manner that the cars of the defendant, then and there moving along said tracks, ran over, crushed, and killed said deceased, etc. The defendant admitted the keeping and maintaining of the guard rail, and alleged that it was properly fastened and blocked, and also admitted that the deceased, while coupling cars, fell near said guard rail, and received injuries, by the trucks of cars passing over and inflicting injuries on him, of which he died; and denied all other allegations.

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At the trial the evidence disclosed that the deceased was in the employ of the defendant as yard switchman at Appleton, and had been for about two years, and had been engaged in railroading, working as switchman, upward of nine years. He had worked over and along by the guard rail in question every day during his employment by the defendant. There was a large number of switches, switch guards, and guard rails in the yard. The railway runs at the point in question from the southwest towards the northeast, and the accident happened in a bright, clear day. The work then in hand was to get five or six cars from the northerly track, and kick one car up the siding, between said northerly track and the main track, and the others were to be set back on the track they were taken from. The engine was headed south, and the car to be set out was the southern one of the string, and the string was pulled out upon the middle or passing track, and the cars were pushed south on that track. As the string was pushed south on the passing track, Curtis, the deceased, was just getting down on the left-hand, or southeast, side of the cars, towards the main track. The witness Wood, who was working with Curtis, was on the top of the end car, and the last car, which, as they backed south, was to be uncoupled and left on the passing or middle track. Several witnesses testified, on the part of the plaintiff, as to the manner in which the accident happened; and their evidence tended to show that Curtis, in coming out, got his foot caught in the guard rail, and fell out from between the cars, on his left side and partly on his back. One witness testified that Curtis "got down off the box car, went in between the cars and came out again, and picked something up and went back in again (the cars being in motion). Witness was about 100 feet distant from him, and next saw him when he fell out from between the cars, and then the cars passed over him. After he went in again the train moved about ten feet before he fell out, and after he

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fell out they moved about fifteen feet before stopping. He saw the cars passing over him, and told the fireman to stop. Curtis said he 'got caught,' and pointed over towards the guard rail." Cramer testified that he saw Curtis come out from between the cars, and he picked something up and went in again. "The next time I saw him, he was hanging onto the car ahead of him, the last car. I saw he had hold of the car, or hold of something on the car, and it seemed to draw him forward. . . . His body was leaning further forward than his feet. I could not tell if he was moving his feet. . . . He might have remained in that position four or five seconds. The car he was holding onto spread from the others. When he let go, he fell down. I think he was on his left side. That would be facing me. I could not tell where his feet were when he fell. I did not see him stumble or catch his foot. The train was going about as fast as a man would walk." Hoffman testified that he was within twelve feet of Curtis when he was injured, on the side of the main track. "After he picked up the stone he went in between the cars, which were moving slowly,— I guess he was trying to knock the pin out,— and he got caught on the rail. I saw it. And the train slowly moved and knocked him over to the south, with his body outside and his feet inside. He made an effort to move his feet, but could not. He seemed to be caught at the end of the guard rail towards the depot. All that I noticed was that his feet were caught, and the cars pushed his body away. I did not look which foot was caught. I did not notice both feet. He was standing with both feet between the two track rails." Other evidence was produced, circumstantial and otherwise, tending to show that Curtis got his foot caught between the guard rail and main rail, and, being unable to get it out, the wheel of the car passed over his legs, and cut them off between the ankles and the knees, in a diagonal manner; and the shoe of his left foot was torn and crushed,

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and the sole partly torn off, and the other shoe was also somewhat torn. Small pieces of bone, and blood spots, were relied on as showing that the injury occurred near the south end of the guard rail.

Considerable evidence was produced tending to show that the guard rail was not properly blocked to prevent switchmen and other operatives getting their feet caught between that rail and the main rail; that the blocking was defective and worn, and did not come up near enough to the top of the rails; that it was loose, and when stepped on it would give way, and teetered up and down; that the blocking was old and much slivered, and insufficient, and defective. There were in defendant's yard forty-one to forty-four blocked switches, and about 250 blockings. Evidence was also produced tending to show that it was a common thing, and indeed customary in this yard, for switchmen to go in between the cars when in motion, to couple or uncouple them, and that such custom was known to and approved by the yard master. It appeared, also, that when a switchman is uncoupling cars he has control of the movements of the train, and may have it stopped, upon his signal, or he may go in between the cars for that purpose, when in slow motion.

Wood testified on behalf of the defendant: "I tried to uncouple it, but could not get the pin out, and I climbed on the deadwood on the north end of the car. Curtis was just coming in with a stone, and he drove the pin loose. I stood on there, and as he drove the pin out I picked it up and laid it on the deadwood. When we first started down the passing track, Curtis had tried to draw the pin out of the drawbar, and then I tried it. Then Curtis went out after the stone, and tried to drive it out. When we started to go out he stumbled, and as he was pitching out he stumbled on the north end or arm of the guard rail, about the middle of the arm. I was within touching distance of

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him at the time. He was between the two cars. His right foot stumbled against the guard rail about an inch from the toe of his right foot. It was right on top of the rail. His foot slipped off the rail at the time, and he fell to the left, and sidewise, between the cars. The drawhead had parted about eight inches." After the car had passed over Curtis and severed his legs, the cars did not move more than about ten feet, and he crawled out across the main track. "At the time he was getting the pin out he was on the ground, walking with one foot on each side of the rail. I was looking right down at him, and could see where his feet were."

Evidence was produced on the part of the defendant to show that the blocking of the guard rail at this point was sufficient and in suitable condition, and to rebut the charge of negligence made against it in that behalf.

The defendant, at the close of the plaintiff's case, moved for a nonsuit, which was denied, and at the close of all the evidence asked the court to direct a verdict for the defendant, but this was refused. The defendant then asked the court to instruct the jury that "If the jury find that the injuries to the deceased were received in consequence of his slipping from or stumbling against the arm of the guard rail, then the plaintiff cannot recover." This instruction was refused. The court charged the jury, in substance, that if they found that the defendant was negligent in respect to the manner in which the guard rail was constructed and maintained, and that such negligence was the proximate cause of the accident which occasioned the death of Curtis, then the plaintiff was entitled to verdict. If both or either of such alleged facts are not satisfactorily so proven, then the plaintiff was not, and the defendant was, entitled to their verdict. The court, in its charge to the jury, in speaking of the contention of the defendant that the deceased was guilty of contributory negligence in having gone between the moving cars, with a stone, to loosen the pin and

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uncouple them, and having done which, and while attempting to pass out from between the cars was injured, said to the jury that "The defense insist that this was negligence on the part of the deceased, *and that in attempting to pass from between the cars he stumbled against some object, and was overtaken and crushed by a moving car.* Evidence in the case, if deemed by you credible, tends to prove this contention of the defendant, and if, *in the manner already stated*, you should believe that the deceased received his injuries *in the way just mentioned*, in such case your verdict should be for the defendant. . . . If you shall thus conclude that he was negligent in passing between the moving cars in the manner and for the purpose stated, *and that in attempting to pass out he stumbled as claimed*, and in consequence thereof received his injuries, *or* if his injuries were in any manner caused, in whole or in part, by such negligence of the deceased, if you find that he was negligent in the said respect claimed, you should find for the defendant."

For the appellant there was a brief by *Fish & Cary*, and oral argument by *John T. Fish.* They contended that the testimony shows that the injury to the deceased was not caused by his getting his foot between the guard rail and the track rail, but by his stumbling against the arm of the guard rail while walking between the tracks. The deceased was guilty of contributory negligence in going between the cars while moving in order to uncouple them, and in using a stone to drive out the coupling pin, when he might have stopped the car by a signal to the engineer, and then have got it out without danger. *Goltz v. M., L. S. & W. R. Co.* 76 Wis. 136; *Foster v. C. & A. R. Co.* 84 Ill. 164. By so doing he assumed the risk thereby incurred. *Casey v. C., St. P., M. & O. R. Co.* 90 Wis. 113; *Scidmore v. M., L. S. & W. R. Co.* 89 id. 188; *Culbertson v. M. & N. R. Co.* 88 id. 567; *Kennedy v. Lake Superior T. & T. Co.* 87 id. 28, 34; *Haley v. Jump River L. Co.* 81 id. 412, 421; *Finnell v. D., L.*

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& W. R. Co. 129 N. Y. 669, 670; *Lockwood v. C. & N. W. R. Co.* 55 Wis. 50, 60; *Loranger v. L. S. & M. S. R. Co.* 104 Mich. 80; *Appel v. B., N. Y. & P. R. Co.* 111 N. Y. 550; *Pennsylvania Co. v. Hankey*, 93 Ill. 580; *Peoria, D. & E. R. Co. v. Puckett*, 42 Ill. App. 642; *Peoria, D. & E. R. Co. v. Ross*, 55 id. 638. If there was a custom of so going between cars to uncouple them, it was established by the switchmen for their own convenience, and they thereby assumed the risks. *Kroy v. C., R. I. & P. R. Co.* 32 Iowa, 363; *Chicago, R. I. & P. R. Co. v. Clark*, 108 Ill. 118.

For the respondent there was a brief by *Greene, Vroman & Fairchild*, and oral argument by *C. E. Vroman.*

PINNEY, J. 1. We think that, in view of the evidence, the circuit court rightly denied the defendant's motion for a nonsuit, and also the request that a verdict be directed in favor of the defendant. The substance of the charge of negligence is that the guard rail was constructed, kept, and maintained in a careless and negligent manner, and that the space between it and the main rail was just wide enough to admit the sole and the heel of a boot or shoe, and allow the same to become caught and fastened, and that such space, in the present instance, was negligently and unnecessarily allowed by the defendant and its agents to remain without sufficient blocking or other protection, whereby, without fault on the part of the plaintiff's intestate, while in the due performance of his duties, he was caught by the heel of his left foot, and held there, so that the defendant's moving train ran over him, causing his death. The necessity of proper blocking of guard rails is not denied. The evidence tends to show that the defendant was guilty of negligence in this respect, which was the proximate cause of the death of the plaintiff's intestate. It is not deemed necessary to set forth or discuss the evidence upon this point. It is sufficient to say that in our judgment it was such as to entitle the plaintiff to have the

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case sent to the jury, under proper instructions as to the law. *Valin v. M. & N. R. Co.* 82 Wis. 5, 6, and cases cited; *Kane v. N. C. R. Co.* 128 U. S. 91. The plaintiff's intestate assumed the risks and dangers fairly and naturally incident to his employment, and if an unusual element or cause of danger was open and obvious, such that, in the exercise of ordinary care, he ought to have observed it and comprehended the danger likely to ensue, he assumed such risk, if he continued in the defendant's employ. But the duties of yard employees are dangerous, and the company owes them the duty of careful and vigilant inspection to discover and remedy any fault, defect, or want of repair in the tracks, guard rails, switches, etc. The duty of the employee to exercise ordinary care as to any risk or cause of danger does not serve to relieve the company of its duty of careful and vigilant inspection, or devolve it on the employee; for the latter, while in the exercise of ordinary care, and until admonished in some manner to the contrary, has a right to assume that the company has properly discharged the duties it owes to him to secure his safety. And the company must be held to have known what by the exercise of careful and vigilant inspection it might have ascertained. *Paine v. Eastern R. Co.* 91 Wis. 340; *Promer v. M., L. S. & W. R. Co.* 90 Wis. 215, and cases cited; *Goodrich v. N. Y. C. & H. R. R. Co.* 116 N. Y. 398. The case is very different from what it would have been if the duties of the plaintiff's intestate had required him to observe and make safe the condition of the guard rails and blockings in the yard. "This court has repeatedly held, in effect, that, before an employee can be held to have assumed an unusual or extraordinary risk, he must know, or have reasonable means of knowing, of the precise danger to which he is exposed and which he thus assumes; and that a mere vague surmise of the possibility of danger is not enough to take the case from the jury." *Kennedy v. L. S. T. & T. R. Co.* 93 Wis. 32; *Dorsey v. Phillips*

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& C. Const. Co. 42 Wis. 583. The evidence does not disclose any ground upon which it can be properly held, as a matter of law, that the plaintiff's intestate assumed the risk of danger arising from the defective condition or insufficient blocking of the guard rail, to which the plaintiff imputes the accident.

It is vigorously contended that the plaintiff's intestate was guilty of contributory negligence in going in between the cars to uncouple them, while in slow motion, using a stone, as he walked along, to loosen the coupling pin; that he could have signaled the engineer to stop, and could have taken the pin out without any danger, and that he had his choice which course he would take, and took the most dangerous one, and was therefore guilty of contributory negligence; and that there can be no recovery. There was evidence of a custom or usage in this yard, which had the consent and approbation of the yard master, for the yard switchmen to go between the cars, coupling or uncoupling them, while in slow motion. There was no evidence to show that such an act is necessarily dangerous, or one which switchmen of ordinary care and prudence would not undertake; and, in view of the evidence as to the custom and usage, we cannot say, as a matter of law, that such an act is negligence, *per se*, which would defeat a recovery. It is enough to say that, if an act of negligence, the plaintiff's intestate assumed the risk of all damages or injury proximately resulting from it, but not those resulting wholly from the negligence of the defendant in failing to keep the guard rail properly blocked. The evidence tends to show that the uncoupling of the car was safely accomplished while the train was in motion, and that the accident resulted solely in consequence of defects in the guard rail and blocking. The plaintiff's case may well rest on this contention, and whether it is true or not is a question for the jury.

2. The court was requested, on behalf of the defendant, to

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instruct the jury that, if they found "that the injuries to the deceased were received in consequence of his slipping from or stumbling against the arm of the guard rail, then the plaintiff cannot recover in this action," but this instruction was refused. There was testimony before the jury sufficient, if believed by them, to sustain a verdict in favor of the defendant upon the ground specified in the instruction. If the plaintiff's intestate received his injuries in consequence of his slipping or stumbling against the arm of the guard rail, then the injuries which caused the death of the plaintiff's intestate were accidental, and such at least as were incident to his employment, and the risk of which, in such case, must be considered to have been assumed by him in entering upon his employment. The instruction so asked was expressed in clear and accurate terms, and was warranted by competent evidence. The defendant had a right to have it given to the jury as asked. *Campbell v. Campbell*, 54 Wis. 90–98. It was not clearly and directly stated in the general charge. It may be said, perhaps, to be an inference from the statement of the court that if both the defendant's alleged negligence, and that it was the immediate or proximate cause of the accident which occasioned the death of Curtis, were established to the satisfaction of their minds, then the plaintiff was entitled to a verdict, "but, if both or either of such alleged facts are not so satisfactorily proved, then the plaintiff is not, and the defendant is, entitled to your verdict." We do not think it was sufficiently covered or embraced in the instruction on the subject of alleged contributory negligence, consisting of the plaintiff's intestate "having gone between the moving cars with a stone to loosen the pin and uncouple the cars, having done which, and while attempting to pass out from between the cars, he was injured; that the defense insist that this was negligence on the part of the deceased, and that in attempting to pass from between the cars he stumbled against some object, and was overtaken

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and crushed by a moving car;" that "if, in the manner already stated, you should believe that the deceased received his injuries *in the way just mentioned*, in such case your verdict should be for the defendant;" and also that if he "*was negligent* in passing between the moving cars in the manner and for the purpose stated, *and that* in attempting to pass out he stumbled as claimed, and in consequence thereof received his injuries, . . . you should find for the defendant." The matter embraced in the instruction asked was, in the instructions thus given, so combined and connected with the matter of negligence on the part of the deceased as to deprive the defendant of all benefit of a proper instruction on this point. The instructions left the jury to understand that, in addition to proof that the injuries of the deceased were received in consequence of his slipping from or stumbling against the arm of the guard rail, in order to constitute a defense it must also appear that there was concurring negligence on the part of the deceased. The proposition as to the negligence of the deceased, and as to his alleged slipping and stumbling against the arm of the guard rail, are improperly combined in the instructions given. It was error to refuse the instruction asked, in view of the fact that it was not sufficiently and plainly embraced and covered in the general charge. In the most favorable view that can be taken of the general charge on this subject, it was indefinite and misleading.

There were some questions presented in relation to the admissibility of evidence, but, as they may not arise upon another trial, they do not require attention.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded for a new trial.

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SPENGLER, Appellant, vs. HAHN and others, Respondents.

February 24 — March 16, 1897.

Judgment in foreclosure: Costs.

1. Our statute (sec. 3162, R. S.) requiring that a judgment for the plaintiff in an action to foreclose a mortgage shall fix the amount due and "adjudge that the mortgaged premises be sold for the payment" thereof, is mandatory, and leaves to the court no discretion to enter a judgment in the alternative form.
2. That statute does not, in terms, give costs to the prevailing party, but it leaves the matter to be regulated by sec. 2918, R. S., which provides that "in all equitable actions costs may be allowed or not to any party, in the discretion of the court." The word "costs" so used includes solicitor's fees stipulated in a mortgage.
3. This discretion as to costs should not be exercised arbitrarily, but the long-established rule that the prevailing party is entitled to full costs should prevail, unless the ends of justice require a departure therefrom.

APPEAL from a judgment of the circuit court for Shawano county: JOHN GOODLAND, Circuit Judge. *Reversed.*

This is an action to reform a mortgage by correcting a description therein in a material particular, and to foreclose the same and a second mortgage as well. Both mortgages were given by defendant *Augusta Hahn* to Alfred T. Hammond, and were assigned by him to the plaintiff before the commencement of the action. Defendant *Matt Wagner* answered, among other things, that *Augusta Hahn*, after the giving of the mortgages, sold the property to defendant *Peter Ketter*, who procured plaintiff to furnish the money to take up the two mortgages, with the understanding that she should charge but seven per cent. interest upon the note secured by the mortgages until they were paid, instead of eight per cent., as provided in such notes; that thereafter defendant *Peter Ketter* sold the property to defendant *Matt Wagner*, under an agreement whereby the amount due upon the mortgages was to be paid out of the purchase money;

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that, for the purpose of determining what amount should be reserved for that purpose, defendant *Ketter* procured a statement from the plaintiff, in which interest was figured at seven per cent. per annum, and the total amount claimed being $413.43; that such statement was delivered to said *Wagner*, and that he relied upon the same, and retained that sum only, out of the purchase money, to apply upon such mortgages; that his vendee, *Ketter*, is insolvent; that, before the commencement of the action, said *Wagner* tendered the full amount due to the plaintiff, upon condition that she should deliver to him proper assignments of the mortgages and satisfactions thereof; that she refused to take less than eight per cent. interest, notwithstanding she had theretofore furnished the statement upon which defendant relied, computing the interest at seven per cent. Some other allegations were included in the answer, going to show that plaintiff was not equitably entitled to costs.

The trial court found the facts as alleged in the complaint, except that on the 6th day of May, 1895, the amount due was as claimed by defendant *Matt Wagner*.

The court further found facts to the effect that the reason why the mortgages were not satisfied before the commencement of the action was that plaintiff refused to pay the expenses of recording the assignments of the mortgages, and to deliver the satisfactions thereof, unless defendants would pay seventy-five cents, expenses for such recording and satisfactions, which they refused to do; that defendant *Matt Wagner* offered to pay the amount due on the mortgages, but did not actually tender the same; that the difference between the parties which led to the foreclosure was that *Wagner*, in good faith believing that it was his right so to do, insisted on plaintiff's recording the assignments, at her own expense, and furnishing satisfactions of the mortgages; and that, when the action was brought, plaintiff insisted upon a greater rate of interest than she was entitled to.

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From such facts, the court concluded, as a matter of law, that plaintiff was entitled to a judgment foreclosing the mortgages described in the complaint, and for costs and disbursements of the action, unless defendants *Matt Wagner* or *Fred Wagner* paid into court, within ten days after notice of the filing of the findings, $400 principal and $44.36 interest, with interest on $400 from the 27th day of April, 1896, at the rate of eight per cent. per annum up to the time of such payment; and, if such payment were made within the time limited therefor, then that the action should be dismissed, without cost to either party; but, in case such payment were not made within such time, then that plaintiff might apply for judgment foreclosing the mortgages according to the prayer of the complaint. The money was paid into court in accordance with such conclusion, and thereupon judgment was entered dismissing the complaint, without costs, and plaintiff appealed.

The cause was submitted for the appellant on the briefs of *Goodrick & Goodrick*, and for the respondents on that of *M. J. Wallrich*, attorney, and *Geo. C. Dickenson*, of counsel.

MARSHALL, J. Numerous exceptions to the findings of fact and conclusions of law were duly filed, but a detailed discussion of the same is unnecessary. An examination of the record fails to disclose any error in the findings of fact excepted to, but the conclusion of law respecting the proper judgment to be entered was manifestly made in disregard of the statute, which declares in mandatory language what relief shall be granted in such cases. The language of sec. 3162, R. S., is: "In all such actions, if the plaintiff shall recover, the judgment shall fix the amount of the mortgage debt then due, . . . and shall adjudge that the mortgaged premises be sold for the payment of the amount adjudged to be then due, . . . or so much thereof as may be sufficient to pay such amount for principal, interest and

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costs, including costs of sale, and when demanded in the complaint, an order directing that judgment be rendered for any deficiency against the parties personally liable therefor." Such statute is exclusive. It leaves nothing whatever to judicial discretion or the exercise of the general equity powers of the court, except to determine the amount of costs which the prevailing party may recover. It does not, in terms, say that the prevailing party shall recover costs. That is left as regulated by sec. 2918, which provides that, "in all equitable actions, costs may be allowed or not to any party, in the discretion of the court." *Jones v. Jones*, 71 Wis. 513; *Portz v. Schantz*, 70 Wis. 497. The word "costs," so used, includes solicitor's fees stipulated in the mortgage to be paid in addition to taxable costs. *Reed v. Catlin*, 49 Wis. 686. Such discretion, however, is not to be exercised arbitrarily, or to suit the caprice of the presiding judge, but is governed by some rules which have become well established by long-settled practice, among which is that *prima facie* the prevailing party is entitled to full costs. Such rule should not be departed from without some special circumstance existing reasonably sufficient to vary it, and requiring such departure to the end that justice may be done between the parties. 3 Wait, Prac. 472; 5 Ency. of Pl. & Pr. 185. While the exercise of judicial discretion in such cases necessarily must have a wide range, and not be called in question except for manifest abuse, in the foreclosure of a mortgage, where the parties have contracted for the allowance of solicitor's fees in addition to taxable costs, it requires a very strong case against such allowance, on equitable principles, to justify a total denial of costs and solicitor's fees as well. It sufficiently appears that the question of what costs should be allowed here was not determined by the trial court in respect to the entry of a proper judgment as required by law; hence, with the foregoing observations on the subject, that may be considered an open question, to be

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determined by further proceedings in accordance with this opinion.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded for further proceedings in accordance with this opinion.

BRYANT, Appellant, vs. BANK OF COMMERCE, Respondent.

February 24 — March 16, 1897.

Special agency: Delegation of power.

A committee appointed by the directors of a bank from their number, and authorized by them to purchase certain lots for the bank on such terms as should seem to them most advantageous to it at a price not exceeding a sum named, is a special agent and must act within the special authority given; and it has no power to bind the bank to pay a larger sum for those lots than the price fixed by the board, or to give in addition another parcel of land; much less have the president and cashier of the bank, either as members of the committee or by virtue of their offices, power to delegate such authority and discretion to a third person and bind the bank to pay him a commission for his services.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

The case is fully stated in the opinion.

For the appellant there was a brief by *Knowles, Dickinson, Buchanan, Graham & Wilson*, and oral argument by *S. N. Dickinson.*

For the respondent there was a brief by *Catlin, Butler & Lyons*, and oral argument by *T. E. Lyons.*

CASSODAY, C. J. This action is brought by the plaintiff to recover the amount of his commission for negotiating for the purchase from one Henry W. McNabb of the three lots

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described. The plaintiff claims that he made a contract with McNabb for the purchase of such lots for $38,250 in cash, and lot 24 and five feet off the north side of lot 25 in another block; that it was agreed and understood that he was to have, as his commission for such purchase, all of the rents accruing and due from the tenants occupying said lots, and the buildings thereon, from the time of such purchase, for the months of March and April, 1893, and that he was also to have, as and for a part of his commission, the several buildings upon said lots, which he was to remove; that the rents for those two months amounted to $710, and that the buildings thereon were reasonably worth $2,250, amounting in the aggregate to $2,960. The defendant, by way of answering, admitted that it was a corporation, as alleged, but denied each and every other allegation of the complaint.

It appears from the evidence, among other things, that at a meeting of the board of directors of the defendant, January 20, 1893, Beebe, Johnson, Reed, Buxton, Brooks, and Butler being present, certain preambles and resolution were adopted, to the effect that it was desirable that the bank be removed as soon as possible into more suitable quarters, and it had been proposed that a separate corporation be formed for the purpose of procuring a site on Tower avenue and erecting a block thereon to be used by the bank and for other purposes, the bank to have an interest in said corporation, and that the southwest corner of North Seventh street, known as the "Agen Corner," could be purchased for $35,000, and the southeast corner of the same street, known as the "McNabb Corner," could be purchased for $35,000, and it was best that one or the other of said corners be purchased for the purpose aforesaid: Therefore be it "resolved, that the president, cashier, and gentlemen Reed and Beebe, constitute a committee to treat with the owners of said corners, and they are hereby authorized

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to purchase one of the same upon such terms as shall seem to them most advantageous for the bank, the price to be given for the corner selected not to exceed the price of $35,000."

It is also claimed on the part of the plaintiff that there is evidence to the effect that Brooks was the cashier, and Buxton president, of the defendant bank at the time the deal was made, and that Reed, Beebe, Brooks, and Buxton were also directors; that Brooks, on behalf of the committee, had most of the conversation with the plaintiff by which he was authorized to make the deal for the defendant; that Brooks acted under authority given by the board of directors in the resolution, and also as a director and cashier of the bank; that the terms of purchase were agreed to between McNabb and the plaintiff, acting for the bank, and subsequently that that agreement was ratified by Buxton and Brooks, of the committee referred to; that such agreement was concluded February 28, 1893; that McNabb was always ready and willing to carry out the agreement; that Brooks, McNabb, and the plaintiff talked the matter over at the bank; that *Bryant* said in the presence of Brooks that the deal had been made; that *Bryant* showed Brooks a paper, and asked him if he could publish that in the evening paper; that Brooks consented to its publication; that that article was to the effect that the deal which had been pending for some time between the bank and McNabb was that day concluded; that the bank had bought the seventy-five feet front at the southeast corner of Tower avenue and Seventh street, where it would erect, in the early spring, a handsome five-story brick structure, the price paid being $50,000, or $666 a front foot, and that *Bryant* made the deal; that much of the conversation in reference to the terms of the deal that was had with Brooks was in the presence of Buxton, who had directed the plaintiff to go and talk the matter over with Brooks, and that whatever Brooks

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agreed to would be all right; that the plaintiff informed Brooks that McNabb had consented to take $38,250 in cash and the real estate hereinbefore mentioned, in the presence of Buxton, and he nodded assent to the terms; that the terms so assented to were to the effect that McNabb was to receive $38,250, and lot 24 on Tower avenue, and five feet off the adjoining lot 25, making thirty feet, free and clear of all incumbrances, and the bank to receive those three lots on the corner of Tower avenue and Seventh street, and that the buildings were to go to the plaintiff for his commission, and also the rent from that time on, and they said, "All right;" that the plaintiff then wrote the notice so published in the evening paper, and read it to Buxton and Brooks, and they said it was all right; that the plaintiff and McNabb then arranged to deliver possession, and informed Brooks and Buxton that they were ready to do so; that Brooks said, "That's good," and then spoke to Buxton, and said, "Come in at 3 o'clock in the afternoon;" that at the time mentioned the plaintiff and McNabb went into the bank, and Brooks told them to come in the next day; that they went in the next day, but Buxton would not say one thing or another; that Brooks said, "All right," but he was busy and put the plaintiff off; that a few days afterwards Buxton said that there was a good deal of doubt about the trade going through; that the plaintiff soon after told Brooks he wanted his commission; that Brooks then told him to keep cool, and he would see; that the defendant refused to pay such commission, and hence this suit.

Upon such testimony the trial court granted a nonsuit, and from the judgment entered thereon the plaintiff brings this appeal.

Counsel for the defendant contend that the nonsuit was properly granted upon several grounds; but, as stated by the counsel for the plaintiff, "they are practically covered by the ground that there was no evidence to show that the

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plaintiff was authorized by the bank to act for it in making the deal." As indicated, the defendant's board of directors appointed a committee, consisting of four of their number, to treat with the owners of the Agen lots, on one corner, or the McNabb lots, on the other corner, with authority to purchase the two lots on either corner upon such terms as to them seemed most advantageous for the bank, at a price not to exceed $35,000. The "terms" and the "price," within the limitation named, as well as the location, either upon the one corner or the other, were thus left to the judgment and discretion of the committee thus appointed. There is no evidence that two of the committee — Reed and Beebe — or either of them, ever took part in, or was present during, any of the negotiations leading to or agreeing upon the terms of the alleged deal. All conversations of the plaintiff and McNabb in respect to the matter appear to have been with Brooks, the cashier, although some of such conversations, as indicated, were in the presence or hearing of Buxton, the president. There is no ground for claiming that the plaintiff had any authority to act for the defendant in making such purchase, except such authority as he received from Brooks, with the acquiescence of Buxton, in such conversations. By the resolution, the whole committee was not authorized to buy the three lots at $38,250, and give in addition another piece of land having thirty feet front. Much less did the resolution authorize one half of the committee to delegate to the plaintiff the power and authority to exercise such judgment and discretion, and to bind the defendant to pay the plaintiff therefor a commission of $2,960. Besides, the transaction was not within the scope of the ordinary business of the bank, nor incident to such business, but involved the exercise of power given specially by statute for a specific purpose and with prohibitory restrictions. R. S. sec. 2024, subsec. 29, p. 603. It follows that Brooks, as cashier, and Buxton, as president, had no power to delegate such

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authority to the plaintiff by virtue of their respective offices. On the contrary, their only authority to act in the matter at all was by virtue of the resolution. These things being so, there was no implied authority in Brooks and Buxton, or either of them, to appoint the plaintiff as agent of the bank to make such purchase. Morawetz, Priv. Corp. § 536. It is there said that "the authority of the directors of a corporation to appoint inferior agents, with power to represent the company, can be implied only where such appointment would be a reasonable measure in carrying on the company's business in the ordinary manner. Those powers of the directors of a corporation which it is intended they should exercise personally can in no case be delegated. The general supervision and direction of the affairs of a corporation are especially intrusted by the shareholders to the board of directors. It is upon the personal care and attention of the directors that the shareholders depend for the success of their enterprise. It follows that authority to delegate these general powers of management cannot be implied."

Counsel for the plaintiff contend that the question is not what power the plaintiff in fact possessed, but what were his apparent powers; that is to say, what powers had McNabb a right to believe he possessed. While a general agent may bind his principal when acting within the scope of his apparent authority, although he exceeds his specific instructions, yet that is not the rule in the case of a special agent. *Kelly v. Strong's Estate*, 68 Wis. 156; *Hand v. Conger*, 71 Wis. 292; Mechem, Agency, §§ 283–285. "A special agent is one authorized to act only in a specific transaction." Id. § 6. The committee appointed by the resolution was a special agent, and certainly the plaintiff cannot be regarded as anything more. As indicated in the authorities cited: "Where the agency is a special and temporary one, the authority must be strictly pursued, and the principal is not bound if the agent exceeds his authority." 1 Am. & Eng.

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Ency. of Law (2d ed.), 993. We must hold that Brooks and Buxton had no power, for and in behalf of the defendant, to employ the plaintiff to make the alleged purchase, and that the plaintiff never was employed to make such purchase by the defendant.

By the Court.— The judgment of the superior court of Douglas county is affirmed.

GUINARD, Respondent, vs. THE KNAPP-STOUT & Co. COMPANY, Appellant.

February 25 — March 16, 1897.

Master and servant: Negligence: Question for jury: Erroneous instructions.

1. In an action by an employee for an injury alleged to have been caused by the negligence of the employer in not covering or guarding his machinery, the question whether subd. 2, sec. 1636*f*, S. & B. Ann. Stats., required it to be covered or guarded depends upon whether it was "so located as to be dangerous to employees when engaged in their ordinary duties," and that is a question of fact for the jury.
2. When instructions are requested which are correct in law and applicable to the case, the court should give them without modification, and to refuse to do so is error, unless they are substantially given in the general charge.
3. Thus, after giving an instruction in an action for such an injury, substantially as requested, that, "if the jury find that the defendant furnished to the plaintiff a place to work which was as safe and free from danger as other persons of ordinary care in like business and under like circumstances ordinarily furnish, they must find for the defendant," to modify such instruction by adding that "they should not so find if the places provided by such other employers of labor for their workmen or servants are not reasonably safe," has the effect to pervert the force and destroy the meaning of the instruction and leave the jury without a standard by which to test the defendant's liability.

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4. The test of negligence in such a case is the presence or absence of that degree of care which ordinarily prudent persons are accustomed to observe about the same or similar affairs in similar circumstances.

5. In such an action, to instruct the jury in a general way that a preponderance of evidence is necessary to justify a verdict for the plaintiff, and then to add, "You cannot find for the plaintiff unless his evidence outweighs that of the defendant. . . . If the plaintiff has proved his case by a fair preponderance of evidence,—if plaintiff's evidence weighs enough more than that of defendant to turn the scale on the plaintiff's side, even if it be but little, if that little be perceptible,—your verdict will then be for the plaintiff," is calculated to puzzle and mislead the jury.

6. To instruct the jury in such a case that, "If you find for the plaintiff you will bring in such damages as will make him whole in dollars, as far as possible," is misleading, in that it suggests greater damages than are given by the just rule, i. e. "such sum as will fairly compensate for the damages suffered and is reasonable in amount."

APPEAL from a judgment of the circuit court for Dunn county: JOHN K. PARISH, Judge. *Reversed.*

This case was once before this court, and is reported in 90 Wis. 123. The report contains a general statement of the facts, which is sufficient, and need not be repeated. On the retrial the evidence is substantially the same as on the former trial. There is some difference in the details of the trial. There was a general verdict in favor of the plaintiff for $15,000. There was the usual motion to set the verdict aside, and for a new trial, which was denied, and the plaintiff had judgment on the verdict, from which the defendant appeals.

For the appellant there was a brief by *V. W. James*, attorney, and *Losey & Woodward*, of counsel, and oral argument by *V. W. James* and *G. M. Woodward*. They argued, *inter alia*, that the dangers of the employment were open and obvious, and the plaintiff by accepting it assumed the risk. *Luebke v. Berlin Machine Works*, 88 Wis. 442; *Burnell v. West Side R. Co.* 87 id. 387; *Stephenson v. Dun-*

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can, 73 id. 404; *Sweet v. Ohio Coal Co.* 78 id. 127. The defendant was not negligent in not covering the machinery by which plaintiff was caught, that not being usual nor required by ordinary care. *Miss. River L. Co. v. Schneider*, 74 Fed. Rep. 195; *Titus v. B., B. & K. R. Co.* 136 Pa. St. 618; *Iron Ship Building Works v. Nuttall*, 119 id. 149; *Ft. Wayne, J. & S. R. Co. v. Gildersleeve*, 33 Mich. 133; *Ala. G. S. R. Co. v. Arnold*, 35 Am. & Eng. R. Cas. 466; *Louisville & N. R. Co. v. Hall*, 87 Ala. 708.

For the respondent there was a brief by *John R. Matthews*, attorney, and *T. F. Frawley* and *C. T. Bundy*, of counsel, and oral argument by *C. T. Bundy*. They contended that the defendant was negligent in not furnishing the plaintiff with a reasonably safe place to work, in not covering the dangerous machinery, and in not warning the plaintiff of the risk. If the place where he was required to work was not reasonably safe, the custom of other mill owners in that respect would not relieve the defendant from liability. *Kitchen v. Smith*, 101 Pa. St. 452; *Cayzer v. Taylor*, 10 Gray, 280; *C. & H. C. & I. Co. v. Tucker*, 48 Ohio St. 41; *Wabash R. Co. v. McDaniels*, 107 U. S. 454.

NEWMAN, J. When the evidence was all in, the defendant moved for the direction of a verdict for the defendant, on the ground that the testimony was insufficient to establish the defendant's liability. The motion was denied; and the denial is alleged for error. On the former appeal, and on substantially the same testimony, this court considered the evidence sufficient to require the submission of the case to the jury. No reason is perceived why that decision is not to be deemed *res adjudicata* on this appeal. So it could be no error to deny the request.

The defendant also requested the court to instruct the jury that no statute law in this state required the defendant to cover or guard the set screw on which the plaintiff was

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caught. This, also, the court refused. Whether the statute requires such machinery to be covered or guarded depends upon whether it is "so located as to be dangerous to employees when engaged in their ordinary duties." S. & B. Ann. Stat. sec. 1636*f*, subd. 2. That is a question of fact for the jury. It was not error to refuse the instruction.

There being evidence sufficient to take the case to the jury, the judgment must be sustained, unless it shall appear that in some important respect the case was not fairly tried and fairly submitted to the jury. The defendant requested eighteen special instructions to be given to the jury, all of which were refused. The refusal to give these proposed instructions, and the giving of some which were given, are the principal grounds of error alleged. These proposed instructions seem to be, in the main, correct, as propositions of law, and applicable to the facts of the case. Those which were correct should have been given as asked, and without modification. R. S. sec. 2853. The refusal to so give them is error, unless they were substantially given in the general charge.

The action goes on negligence. The defendant was entitled to have the jury correctly instructed on the general principles of the doctrine of negligence, and upon the law as applied to the particular negligence claimed. The particular negligence claimed was the failure of the defendant to furnish the plaintiff a safe place in which to do his work. The place was claimed to be unsafe by reason of the proximity of uncovered machinery. The defendant was entitled to an instruction which should inform the jury of the extent and limit of the defendant's duty to the plaintiff in respect to the safety of the place where his work was to be performed, and the rule of negligence in relation to that situation. The defendant asked this instruction on that point: "The court instructs you that if the defendant furnished a place which was as safe and free from danger as other persons of or-

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dinary care, prudence, and caution, engaged in like business and in like circumstances ordinarily furnish, then you must find that the defendant furnished to the plaintiff a reasonably and ordinarily safe place to work." This proposed instruction undeniably states the law of negligence as applicable to the duty of the master to furnish a safe place to work, and to the facts of the case, with substantial accuracy. It should have been given as asked. It was error to refuse it, unless it was substantially given in the general charge. It was in fact given in the general charge, in substantially the same language, but with the addition of a proviso or qualification which utterly perverts its force, and destroys its meaning, and leaves the jury utterly without a guide or standard by which to test the defendant's performance of the duty which it owed to the plaintiff. It gave correctly the general rule or definition of negligence as "a lack of ordinary care, or such care as men of ordinary care ordinarily use," and that "neither party to this action was bound to use extraordinary care, such care as those use who are more careful, cautious, or prudent than the great mass of mankind ordinarily use." But, as relating specifically to the duty of the defendant to furnish a reasonably safe place for the plaintiff to do his work in, the instruction was: "If the defendant furnished plaintiff a place which was as safe and free from danger as other persons of ordinary care engaged in like business and under like circumstances ordinarily furnish, then you will find for the defendant on such fact; but not if you find that places provided by such other employers of labor for their workmen or servants are not reasonably safe places in which their men are obliged to work. It is for you to say, from the whole evidence, whether such is the fact or not, as you, and not myself, are the judges of the fact."

No doubt the test of negligence is the presence or absence of that degree of care which ordinarily prudent per-

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sons are accustomed to observe about the same or similar affairs in the same or similar circumstances. The doctrine of a safe place to work has little application, as against known dangers. The employer may carry on his business in such place as he pleases, and with such machinery and appliances as he may choose, provided only he does not violate the positive law of the land, nor expose his employees to unknown dangers. The employee is deemed to accept the place furnished, with the risk of such dangers as he knows or can discover by the exercise of ordinary attention. Having observed such degree of care as ordinarily prudent men engaged in the same business observe, the law is satisfied, and no liability arises from accidents which may then happen, although they might have been prevented by the exercise of a greater degree of care. No person is required to exercise a greater degree of caution and prevision than is exercised by the mass of mankind. More care than that is usually impracticable. Ordinarily, the very highest degree of care possible will defeat the success of the enterprise. The law aims to be practical, and to favor what is practicable. The standard by which the liability of the defendant is to be tested is the standard which the law has provided. The jury may not be allowed to make a new one, to suit their inclination, in the particular case. The defendant in the particular action may not be required to have been wise and prudent beyond all his fellows. That is the vice of this instruction. It plainly informed the jury that they were not limited by the law of negligence, but could make the law, for the case, according to their own notion of what was right. It is often easy, after the accident, to see how it might have been prevented. The retrospect has this advantage. Human prevision is limited. This was a fundamental error, which must require a reversal of the judgment.

On the subject of what amount of evidence was necessary to justify a verdict for the plaintiff, the court, after saying

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in a general way that a preponderance of the evidence was necessary, instructed more explicitly by saying: "You cannot find for the plaintiff unless his evidence outweighs that of the defendant. If the defendant's evidence weighs as much as that of the plaintiff, and of course if defendant's outweighs that of plaintiff, you must find a verdict for defendant. If the plaintiff has proven his case by a fair preponderance of evidence,— if plaintiff's evidence weighs enough more than that of the defendant to turn the scale on the plaintiff's side, even if it be but little, if that little be perceptible, sufficient to turn the scale on his side,— your verdict will then be for the plaintiff, and against the defendant." It may well be doubted if the average juryman receives much enlightenment from such refinements upon a general proposition. By the phrase "weight of the evidence" is meant the convincing power of the evidence. It may be permitted to speak of things in their nature imponderable and ideal as having preponderance and weight. Usage sanctions it, and the trained mind readily appreciates the thought. But it may fairly be questioned if, to the untrained lay mind, such metaphors convey any practically useful intelligence. But when it comes to crowding the metaphor further, to the turning of the *scale* by a preponderance, "ever so little, be it only appreciable," it is pressing the figure beyond its capacity for useful service. It may be doubted if even the trained mind has such nicely-adjusted scale as to determine to a hair on which side the evidence preponderates. But even the lay mind can know when it is convinced and satisfied. Such refinement must tend to confuse the lay understanding. This instruction seems well calculated to mislead the jury as to the amount of evidence necessary to justify a verdict for the plaintiff; for, while it is stated that the plaintiff's case must be proved by a fair preponderance of evidence, the instruction seems to say that by a fair preponderance is meant only a little more evidence in weight than the defend-

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ant's evidence can fairly claim, and leaves out of sight or minimizes the important consideration that the plaintiff's evidence must be sufficient in convincing power to satisfy the jury of the existence of the facts which, in law, justify the plaintiff's recovery, before he can be entitled to a verdict. On the idea of this instruction, a case too weak to stand alone when unopposed by a defense may become invigorated and helped out by a still weaker defense. Similar instructions have been criticised by this court. *Gores v. Graff*, 77 Wis. 174; *Heath v. Paul*, 81 Wis. 532; *Pelitier v. C., St. P., M. & O. R. Co.* 88 Wis. 521. The instruction should, in effect, be that, if the jury are *satisfied* by a preponderance of the evidence of the existence of all the facts essential to the plaintiff's right of recovery, then they should find for the plaintiff. *Gores v. Graff*, *supra*. If the mind of the jury is convinced and satisfied, it is quite safe to assume that the preponderance of the evidence is on the side of such conviction.

On the subject of the amount of damages which the plaintiff, if entitled, might recover, the court said: "If you find for the plaintiff, you will bring in such damages as will make him whole, in dollars, as far as possible." It is impossible to know how this advice impressed the jury, or what effect it had upon the size of the verdict. It sounds like an invitation to make free with the defendant's goods. It seems to suggest that the jury should be influenced by no conservative idea of compensation, but that they should aim at something beyond,—dollars enough to make him whole. As if the defendant, be it never so rich, had enough to make him whole! Certainly, this instruction suggested, or might suggest, to the jury, an improper and exaggerated notion of what was due the plaintiff; for, although the defendant may have committed a fault, it is not, for that reason, an outlaw, nor beyond the care of the law. Society may still receive valuable service from it, and so is interested

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to preserve it against spoliation, by applying to plaintiff's recovery a proper limit of compensation. It could not advance the interests of society to impoverish and bankrupt the unfortunate defendant. Doubtless, the underlying idea of the law of damages is indemnity. But, in the case of many injuries to the person, absolute indemnity is impossible. The law has no standard by which it can measure indemnity for such injuries in money. The most it aims to do in that regard is to give some just compensation for the damages suffered, which in many, if not in most, cases must fall short of complete indemnity. The just rule to be given to the jury is, such sum as will fairly compensate for the damages suffered—reasonable in amount, and not excessive.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

CROWTY, Respondent, vs. STEWART, Appellant.

February 25 — March 16, 1897.

Pleading: Complaint for malpractice.

A complaint in an action for malpractice, which alleges that plaintiff's leg was broken; that the defendant being at that time a surgeon, the plaintiff employed him as such surgeon to examine such broken leg and ascertain the extent of the injury and to set the same if broken and to treat and heal the same for whatever was the injury to it; that defendant undertook as a surgeon to do so; that he examined said leg in a negligent and unskilful manner and failed to ascertain that the same was broken, or the extent of the injury thereto, and treated and tried to heal the same as though it was not broken; and that by reason of the defendant's negligent and unskilful examination and treatment plaintiff was made sick and kept from attending to his business and suffered much pain, etc., *held*, to contain in substance all the necessary averments.

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Crowty vs. Stewart.

APPEAL from an order of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

The action is for malpractice, the complaint being as follows: "The complaint of the above-named plaintiff respectfully shows to the court: That in the month of May, A. D. 1894, the plaintiff was, at the city of Duluth, in the state of Minnesota, kicked on the right leg by a vicious horse, and the same thereby broken and greatly injured. That at that time, the defendant being a surgeon, the plaintiff called and informed him of the manner of receiving such injury, and employed him, as such surgeon, to examine such broken leg and ascertain the extent of the injury thereby caused, and to set the same, if broken, and to treat and heal the same, for whatever the injury was to it; and for that purpose the said defendant undertook, as a surgeon, to examine said injured leg, to ascertain whether the same was broken, and also undertook to treat and heal said injured leg for whatever the injury was or may have been to it. That pursuant to said undertaking said defendant examined the said injured leg of the plaintiff in a negligent and unskilful manner, and failed to ascertain that the same was broken, or the extent of the injury to the same, and that he treated and tried to heal the same as though it was not broken, greatly to the plaintiff's injury. That, by reason of the defendant's negligence and unskilful examination and treatment of plaintiff's said broken leg, the plaintiff was made sick and kept from attending to his business ever since the date aforesaid, suffered much pain and annoyance, and was put to great expense, and has been and still is disabled from attending to his labor and business, to the damage of the plaintiff nineteen hundred and fifty dollars."

A general demurrer to the complaint was overruled, and the defendant appealed.

The case was submitted by both parties on briefs.

W. M. Steele, attorney, and *Edson & Hanks*, of counsel, for

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the appellant, contended that the complaint was insufficient because it failed to state that the employment of defendant was for hire or reward. Bliss, Code Pl. §§ 268, 279, and notes; *Jones v. Burtis*, 88 Wis. 478. Also because it fails to show that the defendant was qualified to practice under secs. 1436, 1437*a*, S. & B. Ann. Stats., so as to be entitled to compensation, and a promise cannot be implied. The injury to plaintiff is not alleged to result from the defendant's failure to exercise ordinary professional care, skill, knowledge, or judgment.

Swift & Cooper, for the respondent, contended that the fact of defendant's employment raises an implied promise to compensate, and a duty on his part to exercise ordinary skill. *Peck v. Hutchinson*, 88 Iowa, 320; *Morrill v. Tegarden*, 19 Neb. 524.

WINSLOW, J. It is manifest that the complaint is entirely sufficient. It contains, in substance, the averments declared by this court to be necessary in the case of *Jones v. Burtis*, 88 Wis. 478. No further treatment of the subject is necessary.

By the Court.— Order affirmed.

HAWKINS, Respondent, vs. LUTTON and others, Appellants.

February 25 — March 16, 1897.

Disorderly house: Arrest without warrant: Appealable order.

1. At common law the term "disorderly house" means a house the inmates of which behave so badly as to become a nuisance to the neighborhood, or one which is kept in such a way as to disturb or scandalize the public generally, or the inhabitants of a particular locality, or the passers-by; and it has that meaning in a city ordinance which provides for the punishment of any person found in

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a "disorderly house, or a house of ill fame, or a place resorted to for the purpose of prostitution." To be a "disorderly house" it need not be a house of prostitution.

2. A city council may lawfully, by ordinance, authorize police officers to arrest without warrant persons engaged in their presence in a breach of the piece, i. e. a disturbance or violation of public order; and an officer who from the outside of a house hears a disturbance or disorderly conduct within it may, acting in good faith under such authority, enter the house and arrest the person guilty thereof as being an inmate of a disorderly house.

3. An order denying a motion for a new trial, based on the minutes of the court, is not appealable under ch. 212, Laws of 1895.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Reversed.*

This was an action to recover damages for an alleged false imprisonment of the plaintiff by the defendant *Lutton*, the city marshal of the city of Superior, and his five codefendants, policemen of said city. The plaintiff charges the defendants with having assaulted and imprisoned the plaintiff, and deprived her of her liberty for the space of one day, May 18, 1895, contrary to her will, etc. The defendants answered jointly, in substance, though in a crude and imperfect manner, that they were at the time such officers, respectively, as stated, and that they arrested the plaintiff without warrant, pursuant to section 268 of the ordinances of the city of Superior, by which it was made the duty of the marshal, superintendent of police, and all police officers and watchmen to summarily arrest and take before the police justice of the city all persons in the act of violating any of the provisions of the general laws of the city, or any ordinances passed in accordance therewith, and to make complaint before said justice against such offender, and which allowed a detention of the person arrested in the watch-house or jail for twenty-four hours, Sunday excepted, before taking such person before such justice; that the plaintiff was arrested on the charge of having, on said 15th day of

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May, 1895, at said city, violated section 283 of the ordinances of said city, "in that she did then and there, contrary to said ordinance, be an inmate of, visit, resort to, frequent, and be found in, a disorderly house, house of ill fame, and place resorted to for the purpose of prostitution, assignation, and fornication," with which offense she was in the forenoon of the next day charged, on complaint of said defendant *Lutton*. It was alleged that the defendants, in so arresting the plaintiff, acted in good faith, and without malice, and had probable cause to believe the plaintiff guilty; and, upon information and belief, they charged that she was guilty of said offense, and that she was arrested in and taken from a *disorderly house* in the said city of Superior.

At the trial, the plaintiff produced evidence tending to support her complaint, and that upon the trial in municipal court, on the day after the arrest, she was acquitted of the charge against her, and tending to show that she was not guilty of the said charge. It appeared that the plaintiff and her sister were arrested about 10 o'clock in the evening, and were released upon bail, after a detention of about two hours.

On the part of the defendants, evidence was given by the defendant *Lutton* that he was chief of police, and, on the evening in question, was going past the plaintiff's house, and some police officers were standing in front of it; that he staid there two or three minutes, and heard very loud talking in the house,—profane and indecent language,—and learned that the officers had been called there by some of the neighbors; that, after listening two or three minutes, he told the officers to *pull* the house for a disorderly house. It appeared from what he heard that they either had a fight there, or there had been one. There were two male and two female voices. It was a female voice that was doing the principal talking. The language was loud, profane, and indecent. That it was profane and indecent was clear from the evidence of the witness. Defendants' counsel asked the

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witness if he knew the reputation of this house at that time, as to its being a disorderly house, bawdy house, or house of ill fame. Upon objection made, the court ruled that the defendants might show that the plaintiff's house, at the time of the arrest, was a house of prostitution, but not that it was a disorderly house, in the sense that there were disorderly noises, loud, boisterous, profane, and obscene language frequently emanating therefrom, and fighting or quarreling and conduct of that kind carried on therein; and evidence offered by the defendants of that character, to maintain their defense, was then and during the trial excluded, although admitted to some extent as bearing on the question of the character of the house. Evidence was given tending to show that the house had the reputation, at the time, of being a house of prostitution, and that the plaintiff had the reputation of being a prostitute, and that her sister, living there, had the same reputation; and the evidence tended to show that, shortly prior to the arrest, complaints had been made to the police as to the character of the house and the trouble going on there, and that liquor was carried there through the day and night by strange men. Considerable evidence was given tending to show that the house was frequented by strange men at late hours.

In rebuttal, the plaintiff produced evidence tending to show that the house was not a house of prostitution; that the disturbances there were caused by plaintiff's brother, when intoxicated; and that no woman living there used obscene or indecent language.

The court instructed the jury, among other things, that "the word 'disorderly,' in the ordinance, must not be construed to mean a house in which quarrels, disturbances, and that class of things occur, but must be construed in the more restricted sense, as meaning a house used for the purpose of prostitution, gambling," etc.; that "the burden of proof was upon the defendants to show, by a preponderance of

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evidence, that the house where the plaintiff was arrested was a place resorted to for prostitution; that the reputation of the house is not conclusive as to its being a house of prostitution, but is merely evidence, and the *fact* that it was such house must be proved by a preponderance of the evidence to your satisfaction, before this arrest can be justified. Was the house where the arrest was made such a house as the ordinance covers? If yes, did plaintiff reasonably seem to the defendants to be there for immoral purposes? If you answer both of these questions in the affirmative, your verdict will be for the defendants; otherwise, it will be for the plaintiff."

There was a verdict for plaintiff for $500. After verdict, the defendants filed in court a release and discharge, executed and acknowledged by the plaintiff, whereby, in consideration of $40, she released and discharged them from all liability by reason of the verdict rendered in the action and any judgment that might be entered thereon, and costs, and from all liability and obligation for damages sustained by her by reason of said false imprisonment, and any cause of action she might have against the defendants. After judgment, upon motion founded upon and opposed by affidavits, the court made an order vacating and setting aside said release, and reinstating the verdict and judgment, and directing the $40, less $10, costs of motion, to be returned to the defendants. The defendants appealed from said judgment, and from said order, as well as from an order denying a motion for a new trial, founded on the minutes of the court.

For the appellants there was a brief by *Reed & Reed* and *H. W. Dietrich*, and oral argument by *Mr. Dietrich*.

For the respondent there was a brief by *Loud & O'Brien*, and oral argument by *W. R. Foley*. They contended that the defendants had no right to arrest the plaintiff, there being no evidence that she was guilty of any noise or dis-

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turbance. *Griffin v. Coleman*, 4 Hurl. & N. 265; *Bowditch v. Balchin*, 5 Exch. 380; *People v. Haley*, 48 Mich. 495; *People v. Baitz*, 53 id. 495. A police officer had no right to arrest without a warrant except for a felony or breach of the peace committed in his presence. *Drennan v. People*, 10 Mich. 169; *Wahl v. Walton*, 30 Minn. 506; *People ex rel. Kingsley v. Pratt*, 22 Hun, 300; *Shanley v. Wells*, 71 Ill. 78.

PINNEY, J. 1. The ordinance for the violation of which the defendants arrested the plaintiff provides that "any person who shall, within the limits . . . be an inmate of, visit, resort to, frequent, or be found in a *disorderly house or place*, or a house of ill fame, or a place resorted to for the purpose of prostitution, assignation, fornication, or for the resort of persons of ill fame, or ill name, or dishonest conversation, or common prostitutes, shall, upon conviction thereof, be punished," etc. The trial court held that a house could not be considered a disorderly house unless it was a house of ill fame, resorted to for the purpose of prostitution, assignation, fornication, gambling, etc., and charged the jury that the arrest of the plaintiff could not be justified unless the fact that the house of which the plaintiff was an inmate was a house of prostitution was proved to the satisfaction of the jury; that the word "disorderly" must not be construed to mean a house in which quarrels, disturbances, and that class of things occur, but must be construed in the more restricted sense, as meaning a house used for the purpose of prostitution, gambling, etc. The ordinance is clearly directed against disorderly houses and places, independent of the question whether they are houses of ill fame, or places resorted to for the purpose of prostitution, etc., or for the resort of persons of ill fame or ill name or dishonest conversation, or common prostitutes. A house the inmates of which behave so badly as to become a nuisance to the neighborhood is esteemed, at common law, a disorderly house, and

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so of one which is kept in such a way as to disturb or scandalize the public generally, or the inhabitants of a particular neighborhood, or the passers-by. 2 Wharton, Cr. Law (7th ed.), § 2392; 5 Am. & Eng. Ency. of Law, 693; *State v. Wilson*, 93 N. C. 608. And it seems that a complaint for keeping such a house may be maintained by proof that only one person in the neighborhood or community was disturbed or annoyed, if the acts done were of such a nature as tended to annoy all good citizens. *Comm. v. Hopkins*, 133 Mass. 381. The term "disorderly house" denotes a house or other like place in which people abide, or to which they resort, disturbing the repose of the neighborhood, violating public order and tranquillity. 1 Bish. Cr. Law, § 1106; *Garrison v. State*, 14 Ind. 287. The ruling of the trial court was clearly erroneous, and, in its application to the case, practically nullified an important clause of the ordinance, designed to preserve the public peace. The same error occurs in other instructions given, and in instructions refused, and in ruling that evidence that there were disorderly noises, boisterous, profane, and obscene language, frequently emanating from the house, and fighting and quarreling and conduct of that kind carried on therein, could not be received as a justification of the arrest. The court, however, admitted considerable such evidence, but erroneously restricted its effect to showing, in connection with other facts, that the house was a house of prostitution. It is said that the defense that the house here in question was a disorderly house was not set up in the answer, but we think that the answer, though crude and general, was sufficient, in substance, to admit the evidence. The remedy of the plaintiff, if it was deemed indefinite and uncertain, was by motion to correct the answer.

2. It is argued that the arrest of the plaintiff without a warrant was illegal, and cannot be justified. The defendants, by virtue of their offices, were conservators of the pub-

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lic peace, and had a right at common law to arrest all persons who were guilty of a breach of the peace, or other violation of the criminal laws, in their presence; but in all such cases the arrest must be made at the time of the offense, or immediately after its commission. The provisions of the ordinance pleaded in that behalf are substantially to the same effect, and authorized a summary arrest of any one in the act of violating any of the general laws, or any ordinances of the city passed in accordance therewith. The city council had power to pass such an ordinance, authorizing police officers to make arrests of persons engaged in a breach of the peace without warrant, such authority not being repugnant to the general laws of the state. 1 Am. & Eng. Ency. of Law, 735, notes, and cases cited; *Comm. v. Hastings*, 9 Met. 259; *White v. Kent*, 11 Ohio St. 550. A disturbance and violation of public order is a breach of the peace. 2 Am. & Eng. Ency. of Law, 515. The evidence tends to show that the alleged violation of the ordinance may fairly be said to have been committed in the presence of the defendants. They had heard the disturbance and disorderly conduct from the outside of the house, and the evidence tends to show that they had been summoned there, or their attention had been attracted to it. The chief of police arrived in time to become aware of the conduct in progress within, and, acting in apparent good faith and on what appeared to be reasonable ground, ordered the house to be *pulled*. The policemen at once entered the house, and found the plaintiff an inmate and abiding therein. The evidence tends to show that she was its proprietor. The authority of conservators of the public peace to make arrests in such cases should be liberally construed and upheld, but always at the risk that they will be liable if it be misused or abused. *People v. Bartz*, 53 Mich. 493; *Ballard v. State*, 43 Ohio St. 340; *O'Connor v. Bucklin*, 59 N. H. 589; *State v. Russell*, Houst. Cr. Cas. 122.

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For these reasons, we think there must be a new trial. The order setting aside the release appears to have been warranted by the facts, and should be affirmed. The appeal from the order refusing a new trial cannot be sustained. The order was not appealable. Laws of 1895, ch. 212.

By the Court.— The order setting aside the release, appealed from, is affirmed; the judgment of the superior court is reversed, and the cause remanded for a new trial; and the appeal from the order refusing a new trial is dismissed.

BAILLIE, Respondent, vs. STEPHENSON and others, imp., Appellants.

February 26 — March 16, 1897.

Garnishment: Equitable assignment.

An agreement by a mortgagee of lands to discontinue foreclosure proceedings commenced by him, in consideration that the mortgagor should turn over to him the rents of such lands to be applied on the debt, in pursuance of which such foreclosure was discontinued, and the mortgagor directed his agents for the collection of the rents to pay over the same to the mortgagee when collected, and they credited such rents to the mortgagee on their books, is *held* to constitute a valid equitable assignment of such rents, and they were not subject to garnishment in the hands of the agents in favor of a judgment creditor of the mortgagor.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Reversed.*

The defendant Dobie was indebted to the *Land & River Improvement Company*, in a large sum, on purchase-money notes, mortgages, and land contracts. Foreclosure proceedings were pending. The lands were improved and occupied by tenants. Dobie made an arrangement with the *Land & Improvement Company* whereby the improvement company

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agreed to discontinue the foreclosure proceedings, and Dobie agreed to apply the rents upon the indebtedness. The improvement company discontinued the foreclosure proceedings, and Dobie instructed his agents, Upham & Stephenson, to pay over his rents, when collected, to the improvement company. Under Dobie's orders, Upham & Stephenson opened a new account in their books, wherein they credited the improvement company with the rents which they collected for Dobie. They had in hand, not yet paid over, $216.60 of such rents, at the time of the commencement of this action. The plaintiff had a judgment against Dobie and Currie. She issued an execution, and garnished Upham & Stephenson, in aid of the execution. The *Land & River Improvement Company* was interpleaded, for the reason that it claimed to be the owner of the fund. Judgment was given for the plaintiff against the garnishees and the improvement company, from which this appeal is taken.

For the appellants there was a brief by *F. W. Downer, Jr.*, and *Lyman T. Powell*, attorneys, with *Spooner, Sanborn, Kerr & Spooner*, of counsel, and a supplemental brief by *Spooner, Sanborn & Spooner*, of counsel, and oral argument by *A. L. Sanborn.*

Yate H. V. Gard, for the respondent, argued, *inter alia*, that the transaction lacked the essential characteristics of an assignment of the rents, and left them still under the control of the mortgagor, so that if lost the loss would have been his. *Christmas v. Russell*, 14 Wall. 69; *Christmas's Adm'r v. Griswold*, 8 Ohio St. 558; *McEwen v. Brewster*, 17 Hun, 223; *Papineau v. Naumkeag S. C. Co.* 126 Mass. 372; *Rodick v. Gandell*, 1 De Gex, M. & G. 763, 778; *Putnam Sav. Bank v. Beal*, 54 Fed. Rep. 577; *Everdell v. S. & F. du L. R. Co.* 41 Wis. 395, 403. That the mortgagee discontinued the foreclosure, and the rent moneys were credited to him on the agent's books, gave him no title to any specific funds. Arrears of rent are not a *chose in action*

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and cannot be transferred except by writing. *Demarest v. Willard*, 8 Cow. 206, 211; Wood, Landlord & T. § 454.

NEWMAN, J. The question in this case is, Whose were the moneys which were in the hands of Upham & Stephenson? Were they Dobie's moneys, or did they belong to the *Land & River Improvement Company*? The proper answer to this question depends upon whether the transaction amounted, in equity, to an assignment of the fund to the improvement company. It, in the final analysis, all depends on the intention of the parties. If they intended it to be an assignment of the fund, equity will so treat it. In order to constitute an assignment in equity of a debt or chose in action, no particular form is necessary. Any order, writing, or act which makes an appropriation of the fund amounts to an equitable assignment of the fund. No writing is necessary. It may be by parol as well as by deed. It is sufficient if it amounts to a distinct appropriation of the fund by the debtor, and an agreement that the creditor shall be paid out of it. It may be either by giving an order, or by transferring the fund in such a manner that the holder of the fund is authorized to pay the amount directly to the creditor, without the further intervention of the debtor. Willard, Eq. Jur. (2d ed.), 463; *Kingman v. Perkins*, 105 Mass. 111; *James v. Newton*, 142 Mass. 366; *Holbrook v. Payne*, 151 Mass. 383; *Trist v. Child*, 21 Wall. 441; *Peugh v. Porter*, 112 U. S. 737. Such an assignment will be upheld in equity if it assigns a part only of the fund, and without the consent of the debtor (*James v. Newton*, *supra*), and although made before the creation of the fund (*Peugh v. Porter*, *supra*), and will be good against garnishment (Willard, Eq. Jur. 464; *Kingman v. Perkins*, *supra*). Dobie made a distinct appropriation of this fund, and directed it to be paid to the *Land & River Improvement Company*. Upham & Stephenson were authorized to pay it over to the improve-

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ment company without the further intervention of Dobie. The transaction was an equitable assignment of the fund, and the moneys belonged to the *Land & River Improvement Company*. Upham & Stephenson were not liable to garnishment at plaintiff's suit.

By the Court.— The judgment of the superior court of Douglas county is reversed, and the cause remanded with directions to give judgment for the garnishees, dismissing the action, and in favor of the *Land & River Improvement Company* for the fund.

HINZ, Appellant, vs. VAN DUSEN and others, Respondents.

February 26 — March 16, 1897.

Appeal: Review of referee's rulings: Insolvent corporation, action against.

1. In order to bring up for review in the supreme court exceptions to the rulings of a referee on the admission of evidence, they must be renewed in the circuit court upon the motion to confirm or set aside the referee's report, and the exceptions to the rulings of that court thereon be preserved in the bill of exceptions.
2. The findings of fact of a referee will not be disturbed on appeal, unless against the clear preponderance of evidence.
3. To sustain an action by a creditor against a corporation, its directors, and some of its stockholders, to impeach a mortgage given by such directors, as being fraudulently given for the purpose of securing to themselves preferences over other creditors, the plaintiff must show that the corporation was insolvent at the time it was given, or that such directors knew that suspension was impending.

APPEAL from a judgment of the circuit court for Chippewa county: A. J. VINJE, Circuit Judge. *Affirmed.*

This action was brought by plaintiff as a stockholder and director of the *Fifield Manufacturing Company*, a corporation, against such corporation and against *George W. Van Dusen*, *O. D. Van Dusen*, *F. D. Arnold*, and *G. O. Van*

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Dusen, stockholders and directors of such corporation, for equitable relief from alleged fraudulent conduct on the part of said defendant stockholders and directors, having for its purpose to cheat and defraud the corporation, and particularly plaintiff as a stockholder and creditor thereof. Issue was joined in the action by the separate answers of *O. D. Van Dusen* and *G. W. Van Dusen* and the joint answer of *G. O. Van Dusen* and *F. D. Arnold*. The cause was referred to a referee to hear, try, and determine, and such proceedings were thereafter duly had that such referee filed his findings of fact and conclusions of law, to which plaintiff seasonably filed exceptions. Thereafter a motion was duly made on the part of the plaintiff to set aside or modify the report of the referee, and a motion was made on the part of defendants to confirm such report, and for judgment in accordance therewith. The former motion was denied, and the latter granted. An order was accordingly entered, to which plaintiff filed written exceptions on the 21st day of June, 1896.

The findings of the referee are in substance as follows: (1) Since the 26th day of December, 1889, *O. D. Van Dusen*, *F. D. Arnold*, *G. O. Van Dusen*, and plaintiff have been stockholders and directors, and have managed the affairs, of the defendant corporation. (2) Plaintiff was treasurer from the 26th day of December, 1889, to the 7th day of May, 1891, but was not permitted to receive and disburse the moneys of the corporation; but the same were used by the other officers of the corporation for its proper use and benefit. (3) The charge, contained in the complaint, that money was fraudulently credited to defendants *O. D.* and *G. O. Van Dusen* and *F. D. Arnold* is not proven. (4) *G. O. Van Dusen* used the planing mill belonging to the corporation for his personal benefit during the winter of 1892 and 1893, but it was by an agreement with the corporation, and for a sufficient consideration. (5) On the 20th day of February, 1893,

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the corporation owned unincumbered real estate and personal property to the value of $100,000. (6) On said day, at a meeting of the directors of the company, including plaintiff, a partial statement of the indebtedness of the corporation, amounting to $63,048.41, was exhibited; and it was then determined, plaintiff only voting "No," that the corporation should mortgage its real estate to *George W. Van Dusen* for such amount as he was willing to pay of the corporation indebtedness. The company then owed, among others, *G. W. Van Dusen* $13,289.86, and *O. D. Van Dusen* $18,020.20. A six-months note of the corporation for $63,048.41, secured by mortgage on its real estate, was then made and delivered to *G. W. Van Dusen*, whereupon he credited the company with its debt to him, and *O. D. Van Dusen* with the debt of the corporation to him, charging both such debts against such note and mortgage. He then paid other indebtedness of the company to the amount of $30,698.97. (7) All the above-mentioned transactions were pursuant to a resolution of the board of directors of the company authorizing the same, and all the indebtedness thereby funded into the said note and mortgage was just. (8) In September, 1893, an action to foreclose such mortgage was begun, in which plaintiff appeared. Judgment therein by default was rendered October 16, 1893. (9) A chattel mortgage mentioned in the complaint was executed in good faith to the holder of the other mortgage. It covered property necessarily belonging to the mill on the lands covered by the first mortgage, and was in fact included in such mortgage. (10) An unintentional mistake of $1,039.38 was made in favor of *G. W. Van Dusen* in computing the amount of money advanced by him to the corporation on the note and mortgage, which error was corrected by an indorsement on the foreclosure judgment. The amount due at the time of the rendition of such judgment was $64,733.82. (11) On December 31, 1893, *G. W. Van Dusen* sued plaintiff

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to recover of him as indorser on an $8,000 note of the corporation given September 16, 1891, payable to the order of F. G. Bigelow in sixty days after date. Such note was not included in the corporation indebtedness *G. W. Van Dusen* agreed to pay on account of the loan of February 20, 1893. (12) The capital stock of the corporation is $100,000, of which *O. D. Van Dusen* owns $50,000, and has paid thereon $25,000; plaintiff owns $25,000, upon which he has paid $5,000; *G. O. Van Dusen* owns $12,500, upon which he has paid $2,000; *F. D. Arnold* owns $12,500, upon which he has paid $2,000.

The conclusion of law was that the defendants were entitled to a judgment dismissing the complaint, with costs. Judgment was accordingly entered February 6, 1896, from which this appeal was taken.

For the appellant there was a brief by *Hooper & Hooper*, and oral argument by *B. Hooper*.

D. Lloyd Jones, for the respondents.

MARSHALL, J. Error is assigned in that the referee excluded evidence offered by the appellant material to the issues. We fail to find that the exceptions to the rulings excluding such evidence, made before the referee, were renewed on the motion to confirm the report, or otherwise; hence the questions raised by such alleged errors are not before us for review. The objections taken before the referee should have been renewed on the motion to confirm or set aside the report, and the exceptions to the rulings on such objections, so renewed, preserved in the bill of exceptions. The rule that in no other way can a review of such rulings be obtained has been long established. *McDonnell v. Schricker*, 44 Wis. 327; *Gilbank v. Stephenson*, 30 Wis. 155.

Error is assigned on the refusal of the referee to make findings as requested, but we fail to find that any exceptions were taken to such refusal, though appellant is not prejudiced

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by such failure, as substantially all the questions that would thereby be raised are presented by exceptions to the findings of fact that were made. A large number of such exceptions were filed, all of which have received attention, but, under the well-established rule that findings of fact cannot be disturbed unless against the clear preponderance of the evidence, no reason appears to justify interference with the conclusions of the trial court in that regard. There appears to be considerable evidence upon which each of such findings could be reasonably made; therefore they must stand. *Nicholson v. Coleman*, 90 Wis. 639; *Bacon v. Bacon*, 33 Wis. 147; *Tallman v. Fitch*, 49 Wis. 197; *McDonald v. Kelly's Estate*, 70 Wis. 108.

The exceptions to the conclusions of law raise but one question which requires consideration in this opinion, and that is whether, under the circumstances existing on the 20th day of February, 1893, when the proceedings were had whereby *O. D. Van Dusen* and *F. D. Arnold* were paid the indebtedness which the corporation owed them, such proceedings were void as to the appellant, who was then liable on the $8,000 note. The appellant's counsel insists that the conclusion of the trial court should have been in the affirmative, under the rule that the directors of an insolvent corporation cannot prefer themselves over other creditors. The rule itself is questioned by respondents' counsel; but, while there are authorities of the highest respectability against as well as in favor of it, that subject is not open to discussion in this court. Such subject has received consideration in several instances, and with the result that the doctrine is well established here that the directors of an insolvent corporation cannot lawfully prefer themselves over its general creditors. *Haywood v. Lincoln L. Co.* 64 Wis. 639; *First Nat. Bank v. Knowles*, 67 Wis. 373; *Ford v. Plankinton Bank*, 87 Wis. 363. While the mere fact of insolvency does

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not have the effect to convert the assets of the corporation in the hands of its directors into a trust fund for creditors, so as to prevent a diligent creditor from proceeding in an adversary way to collect his debt by the ordinary processes of law, and thereby gain a preference over other creditors (*Ballin v. Merchants' Exch. Bank*, 89 Wis. 278; *Ford v. Hill*, 92 Wis. 188), the directors of the corporation, under such circumstances, cannot, by contracts with themselves, or with others for their benefit, obtain a preference by payment of the claims due them, or due to others, for the payment of which they are responsible as indorsers or guarantors. So far the contention of appellant's counsel must be sustained, but whether the principle involved can be invoked for the benefit of appellant under the facts of this case is quite another question. The fact of insolvency was not found by the referee. Though counsel for the appellant present the appeal upon the theory that such fact appears, it was neither found, nor was the court requested to so find, nor is there any exception to the failure of the court to find on that question. Obviously, the rule for which the counsel contend has no application unless all the facts exist requisite to such application. Insolvency of the corporation is absolutely essential. Without that the directors are trustees for the stockholders primarily, and may in good faith pay a *bona fide* indebtedness to themselves, or may secure such indebtedness by a mortgage upon the corporate property or otherwise. It is when a corporation ceases to be a going institution, or its business is in such shape that its directors know, or ought to know, that suspension is impending, that its assets in the hands of such directors become, by equitable conversion, a trust fund for the benefit of its general creditors, so that, if such directors prefer themselves over such general creditors, such action constitutes a fraud in law, and equity will compel them to make restitution of all property

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thereby diverted to their personal benefit to the prejudice of such creditors. *Beach v. Miller*, 130 Ill. 162; *Hopkins' Appeal*, 90 Pa. St. 69.

It follows from the foregoing that the facts found are not sufficient to enable appellant in equity to impeach the mortgage given to *G. W. Van Dusen* to secure the loan whereby *O. D. Van Dusen* and *F. D. Arnold* were paid. Moreover, the facts found sufficiently show that the corporation was solvent on the 20th day of February, 1893, and that there is no equity in appellant's bill. The total indebtedness on that day, so far as appears from the evidence and the findings, in addition to the indebtedness paid out of the loan covered by the mortgage to *G. W. Van Dusen*, was the $8,000 note, and interest thereon, for which appellant is responsible, and about $4,000 due to the Price County Bank. There were assets, not affected by the mortgage, of $66,000 unpaid on capital stock, $16,000 of which presumably was due, as it required payment of that amount by appellant, *G. O. Van Dusen*, and *F. D. Arnold*, to make the amount paid upon their stock equal the amount paid upon the stock held by *O. D. Van Dusen*. Such payment would furnish an ample sum out of which to discharge the $8,000 note and the $4,000 due to the Price County Bank. This situation of affairs leads to the conclusion that in a winding up of the affairs of the corporation appellant would be liable on his stock in excess of the liability of *O. D. Van Dusen* in a sum equal to or in excess of the indebtedness on the $8,000 note, which indebtedness is his sole reliance to give him standing in a court of equity. It follows, therefore, that it does not appear from the findings of fact or the evidence that the corporation was insolvent at the time the debt to *O. D. Van Dusen* was paid, and that appellant has no ground for complaint in a court of equity; hence the judgment of the circuit court, dismissing the complaint, must be affirmed.

By the Court.— Judgment affirmed.

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WILLIAMS, Respondent, vs. HOEHLE, Appellant.

February 26 — March 16, 1897.

Replevin: Antenuptial gift: Instructions: Waiver.

1. To permit a plaintiff in replevin to waive and withdraw his claim for damages for the detention of the property replevied, after the case has been submitted to the jury, does not effect any substantial right of the defendant, and is not reversible error.
2. A verdict for the plaintiff in replevin for a piano, claimed by her as an antenuptial gift from her husband, is *held* to be sustained by evidence that some two weeks before their marriage, she being at his office, he told her that he had bought her a present and asked her to guess what it was, and just then a man came with the piano and placed it in the room, and from that time they had both treated it as hers.
3. In this case, it was not error for the court to charge the jury to the effect that the transaction on which the plaintiff based her claim to the piano was not strictly one between husband and wife, yet the same principle prevails as if they had been; such instruction being favorable to the appellant.
4. An instruction to the effect that the jury must take the testimony as it was,—credible and false,—and if they found the *burden of proof* in favor of the plaintiff, they must find for her,—the words *burden of proof* being evidently used through inadvertence instead of *preponderance of evidence*,—is *held* not calculated to have misled the jury to the prejudice of the appellant.
5. An instruction that possession "for certain purposes makes a *prima facie* ownership," and that the jury should consider that fact with the other evidence and give it such force as it ought to have in reaching a conclusion, is *held* to have been favorable to the appellant.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

The case is fully stated in the opinion.

The cause was submitted for the appellant on the brief of *John Brennan*, and for the respondent on that of *A. C. Titus.*

Counsel for the appellant argued that there was no perfected gift of the piano to the plaintiff because there was no

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delivery. *Wilson v. Carpenter*, 17 Wis. 512, 516; *Crook v. First Nat. Bank*, 83 id. 30, 36. Delivery after marriage could not render it valid, being then from husband to wife. Sec. 2324, R. S.; *Carpenter v. Tatro*, 36 Wis. 297, 301. A mere intention to make a gift is not sufficient without an execution and acceptance. Thornton, Gifts, §§ 72, 73.

CASSODAY, C. J. This in an action of replevin to recover possession of a piano which the plaintiff claims was given to her by Dr. F. P. Williams about two weeks before they were married. The defendant, as sheriff, justified the taking and detention of the piano, April 16, 1895, under an execution issued on a judgment rendered against Dr. F. P. Williams, February 23, 1894, in favor of one Julia Peterson. At the close of the trial the jury returned into court, and asked if they could give a verdict for the return of the piano and not give damages. Thereupon the plaintiff's counsel, in the absence of the defendant s counsel, withdrew from the consideration of the jury the demand for damages; and the court then stated to the jury that "by consent of counsel the request made for damages for the use of the piano is withdrawn from the case, so that will not be for you to consider." The jury again retired, and returned a verdict to the effect that they found for the plaintiff; that she is and was at the time of the commencement of this action the owner and entitled to the possession of the property in issue; that it was unjustly detained by the defendant; that the value thereof was $150; and the following portion of the verdict stricken out by drawing a lead-pencil mark through the same after they had inserted therein as damages $25, to wit, "That the plaintiff's damages by reason of the detention thereof is $25." The court refused to set aside the verdict and grant a new trial. From the judgment entered thereon accordingly in favor of the plaintiff, with costs, the defendant brings this appeal.

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There is evidence tending to show that about two weeks before the plaintiff married Dr. Williams, in 1891, she was at his room, and he stated to her that he had bought her a present, and asked her to guess what it was; that just then a man came with the piano, and placed it in his room; and that she and he had both treated it as her piano ever since. We think there is evidence sufficient to sustain the verdict. *Kellogg v. Adams*, 51 Wis. 138; *Second Nat. Bank v. Merrill*, 81 Wis. 142, 148. Besides, there is no certificate that the bill of exceptions contains all the evidence, and hence the verdict is a verity.

There is no error in charging the jury to the effect that the transaction upon which the plaintiff bases her claim to the piano was not, strictly speaking, a transaction between husband and wife, but that "the same principle of law prevails that would if they were husband and wife." It is enough to say that this instruction is prejudicial to the plaintiff and favorable to the defendant. The same is true as to the portion of the charge to the effect that the jury must take the testimony as it was,— credible and false; that, if they found *the burden of proof in favor* of the plaintiff, then they must find a verdict in her favor. She was the principal witness. The words in italics were manifestly used by inadvertence. The court had already charged that the burden of proof was on her to show that the property was hers. The court manifestly meant to say that, if they found the weight or preponderance of the evidence in favor of the plaintiff, then they must find in her favor. This may have been an inaccurate expression, but we do not think the jury could have been misled to the prejudice of the defendant. R. S. sec. 2829. The charge to the effect that possession "for certain purposes makes a *prima facie* case of ownership," and then directing the jury to consider that fact with the other evidence in the case, and give it such force as it ought to have in reaching a conclusion, was certainly favor-

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able to the defendant. The defendant was not aggrieved by the fact that the plaintiff withdrew or waived all claim for damages for the detention of the piano. It did not affect any substantial right of the defendant, and hence is not reversible error. R. S. sec. 2829.

By the Court.— The judgment of the superior court of Douglas county is affirmed.

CARMER and another, Administrators, Appellants, vs. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Respondent.

February 26 — March 16, 1897.

Negligence: Injury to child when crossing railroad.

In an action against a railroad company for causing the death of an eight-year-old boy by negligence, there was evidence that at the place where he was killed there was a space between the tracks which was much used by children for play grounds, and a crossing over its three tracks constructed and planked by the railroad company, which was almost constantly used by the people, young and old, to pass from one side of the village to the other, and they frequently crawled under or climbed over trains standing there, without objection by the employees of the company; and that on the day such child was killed a long freight train had been standing over such crossing for nearly an hour, when he attempted to climb between the cars for the purpose of going home, and the train started and killed him, no trainman seeing him,— and there was conflicting evidence in respect to signals. *Held*, that the questions of negligence on the part of the defendant and contributory negligence on the part of the boy were for the jury to determine.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Reversed.*

The plaintiffs' intestate, a boy eight and one-half years of age, was run over and killed by a freight train operated by

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the defendant at the village of Hawthorne, November 11, 1892; and this action is brought by the administrators of his estate, under the statute, to recover damages therefor. There was little dispute upon the trial as to the facts.

The village in question is a small hamlet on the line of defendant's road, containing at the time of the accident probably between 100 and 200 inhabitants; the houses being mostly built along the railway tracks, which at this point run nearly north and south. There were three tracks running through the entire village,—the main track, the side track on which cars were stored, which was east of the main track, and the passing track, which was used when trains passed each other, on the west side of, and about forty feet distant from, the main track. The two switch tracks were about 1,000 feet in length. At about the middle of the switch tracks the people of the village were accustomed to cross the three tracks from one side of the village to the other both on foot and with teams, and had been accustomed to so cross for several years before the accident. The railroad company had constructed plank crossings at this point over the main track and the east side track, but not over the passing track. A highway came up to this crossing on the east side, and another on the west side, but no legal highway had ever been laid across the railroad tracks. About 150 feet north of this crossing stood the depot, which was between the main and passing tracks, and the most of the buildings in the village were near the depot, on the west side of, and close to, the passing track. The people of the village used the space between the tracks indiscriminately for crossing the tracks, and children played between the main track and the passing track. The school house was upon the west side of the tracks, and about 200 feet south of the crossing. The school children were about thirty in number, about half of them coming from the east side of the village. On the day of the accident the plaint-

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iffs' intestate had attended the morning session of school with two other boys. They got out of school a little before 11 o'clock a. m., and came down to the track, and found a freight train of twenty-eight cars standing on the passing track. They went south to the end of the train, and crossed the track to the east side, where one of the boys lived, and then returned north to the crossing, intending to go to the hotel on the west side of the track, where the intestate was living with his parents. The train was still standing on the passing track, and they stopped and played a while in the forty-foot space between the passing track and the main track. While the boys were here the intestate's father climbed through the standing freight train, and went eastward towards the mill pond to scale some logs. He told the intestate to be careful for the cars. After playing for a while the boys started to climb through the opening between two cars which stood over the crossing. Just as they had got well on one end of one of the cars, upon a small platform of what is called a gondola car, the train started with two or three jerks. The boy Roscoe was in the middle, between his comrades. The two companions succeeded in jumping off, one on either side, but the intestate was thrown down between the cars and run over and killed.

There is a dispute in the evidence as to whether any signals were given before the train started. No trainman saw the boys or knew of the accident at the time. The freight train had stood on the crossing nearly or quite fifty minutes, waiting for the passenger train from the north. Upon this state of the evidence a verdict for the defendant was directed and rendered, and from judgment thereon the plaintiffs appealed.

For the appellants there was a brief by *Hetzel & Smart*, attorneys, and *Howard Van Wyck*, of counsel, and oral argument by *E. M. Smart*. They argued, among other things, that the railroad company, having treated the crossing as a

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highway and invited people to use it as such, was bound to exercise the same care there as if it was a strictly legal highway. *Coulter v. G. N. R. Co.* 5 N. Dak. 568; *Chicago, B. & Q. R. Co. v. Metcalf*, 44 Neb. 848; *Lillstrom v. N. P. R. Co.* 20 L. R. A. 587; *Webb v. P. & K. R. Co.* 57 Me. 117; *Kelly v. S. M. R. Co.* 28 Minn. 98; *Stewart v. Pa. R. Co.* 14 Am. & Eng. R. Cas. 679.

For the respondent there were separate briefs by *Pope & Perrin*, attorneys, and *L. K. Luse*, of counsel, and oral argument by *C. C. Pope*.

WINSLOW, J. Had the plaintiffs' intestate been an adult attempting to climb between the cars under the circumstances stated, it seems that he would have been guilty of contributory negligence as a matter of law. *Flynn v. Eastern R. Co.* 83 Wis. 238. There is no such hard and fast rule, however, applicable to children of the tender age of the intestate. Generally the question as to the degree of diligence required of the child must be submitted to the jury. *Whalen v. C. & N. W. R. Co.* 75 Wis. 654. Certainly the present is not a case where the court can say, as a matter of law, that the child was guilty of contributory negligence. *McVoy v. Oakes*, 91 Wis. 214. Contributory negligence not being shown as matter of law, the sole question is whether there is proof of negligence on the part of the employees of the railway company sufficient to go to the jury. There was much proof tending to show that the place where the boy was injured was a licensed way, within the decisions of this court. There seemed to be no substantial dispute on the question, but, even if there was a dispute, there was certainly ample evidence to require the submission of the question to the jury. *Mason v. C., St. P., M. & O. R. Co.* 89 Wis. 156. Not only did the proof tend to show that there was a licensed way, but it also tended strongly to show that the entire space between the depot and the crossing, including the

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tracks, and the ground between the tracks, was almost constantly used by grown persons and children passing and repassing with the knowledge of the railway employees, and without objection to such use. Whatever may be the law in other jurisdictions, it is very well settled in this state that trains cannot be operated in such places in the same manner that they may be lawfully operated in the country. Such a state of facts calls for the exercise of some additional care in the movement of trains. The care to be exercised is undoubtedly that degree of care which is reasonably adequate to meet and avoid the dangers which ought to be anticipated under the circumstances. *Townley v. C., M. & St. P. R. Co.* 53 Wis. 626; *Whalen v. C. & N. W. R. Co.* 75 Wis. 654; *Johnson v. Lake Superior T. & T. Co.* 86 Wis. 64.

It was clearly a question for the jury in the present case to decide whether the trainmen ought, in the exercise of due care, to have anticipated that a child might be present on the track or on the cars when the train started, and, if so, whether some greater degree of care should have been exercised in giving warning of the starting of the train, or some greater precaution taken to guard against such an accident. The train had stood in that place for nearly an hour, blocking all the communication between the two sides of the village. The proof was ample to show that grown persons and children frequently crawled under or climbed over trains at that place under like circumstances. Upon this very day the conductor of the train saw children playing between the tracks and attempting to ride on the cars of his train when it pulled in. The question whether he and his colleagues in the management of the train exercised that degree of care when the train pulled out which ought to have been exercised, in view of the dangers to be reasonably anticipated, was a question for the jury.

By the Court.—Judgment reversed, and action remanded for a new trial.

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LaChapelle, Respondent, vs. Warehouse & Builders' Supply Company, Appellant.

February 26 — March 16, 1897.

Conversion: Measure of damages.

1. In an action for the conversion of a quantity of paving cedar, evidence that the same was delivered on defendant's dock for storage; that it was afterward removed by defendant to its yard; and that when it was demanded by plaintiff the defendant failed to produce the same property, but offered to deliver some intermixed cedar of inferior quality, is *held* to sustain a finding of a conversion.
2. Paving cedar being an article of general merchandise, the proper rule of damages for its conversion is its value as such merchandise and not as firewood, and it is not error in an action for such conversion to exclude evidence of its value for firewood.
3. In such action, the exclusion of testimony as to value by a witness who said that he did not know of any demand for paving cedar for home use or anywhere, nor know what its market value was at the time it was converted, could not prejudice the defendant, and was not an error for which a judgment for the plaintiff should be reversed.
4. Where, in such action, the only evidence as to the value of the property fixed it at ten dollars per cord, it was not error for the court to instruct the jury to allow that value for all that they should find had been converted, with interest at six per cent. from the commencement of the action.

Appeal from a judgment of the superior court of Douglas county: Charles Smith, Judge. *Affirmed.*

This was an action against the defendant for the conversion of eighteen double cords of cedar paving posts, the property of the plaintiff, tried in the superior court of Douglas county. The complaint alleges that the defendant was, at the several times mentioned, a foreign corporation, organized and existing under the general laws of Minnesota, doing business at the city of Superior, in Douglas county, Wisconsin, and as such conducting and operating a dock in

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said city, and that, with the knowledge and consent of the defendant, the plaintiff placed eighteen double cords of cedar paving posts, valued at $18 per cord, on its dock; and alleged the subsequent conversion of the same by the defendant.

The answer was a general denial, coupled with a special denial that the defendant was a foreign corporation, and alleging that it is a Wisconsin corporation, doing business as such under its said corporate name at Superior, Wisconsin, but denied that it was such at any time prior to March 27, 1894. The defendant set up a counterclaim to the effect that when the cedar posts were placed on the dock, the dock was conducted and operated by the Billings Hardware Company, which continued to conduct and operate it until February 1, 1894, when said company conveyed and assigned the said dock, etc., to the said Minnesota corporation, and to W. P. Cockey the accounts and lien against the plaintiff for dockage and storage of said cedar posts, upon which there was due $52; that in April, 1894, Cockey assigned said account to the defendant, and at about the same time the said *Warehouse & Builders' Supply Company* conveyed said dock property to the defendant, and it still owns the same. The defendant set up a further counterclaim of $248 for dockage at said dock, against the plaintiff, of 500 cords of cedar in 1892, when said dock was operated part of the year by the said Minnesota corporation and part by the Billings Hardware Company; that said account had been assigned to the defendant.

The defendant was named in the summons as the "*Warehouse & Builders' Supply Company*," and the service appears to have been made July 3, 1894, on the said defendant, by delivering a copy and reading the summons to W. C. Moss, its general manager.

At the trial, the plaintiff gave evidence tending to show that October 4, 1892, he put on the dock of the *Warehouse*

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& Builders' Supply Company twenty-five cords of cedar, and thirty or thirty-five cords for Kiever & Burke; the twenty-five cords were chopped cedar, and piled by itself in front of the dock, not marked; that it was removed from the dock five or six days thereafter, without his knowledge or consent. It was admitted that Mr. Cockey was president, and Mr. Moss was secretary, of the defendant. The witness testified that he "spoke to Mr. Cockey about the cedar, and asked him where he got his authority to remove it into his own yard. Told him it was mine, and that there was nothing due on it except dockage. He said everybody had been landing cedar on the dock, and that he took it for dockage. He said that any time I wanted the cedar it would be put where I could get it. I could have it by paying the dockage. That the dockage would be $3 a car load." And that he (witness) told him that that would be all right. The spring before the action was commenced he asked Mr. Moss about the cedar. He said he was ready to return it if witness would pay the dockage of $52. He told Moss he would not pay that. He would pay what was agreed on and no more. That he told him he wanted the cedar or the price of it. He said he would do nothing until he got $52. He said he had the cedar there, and would return it and all that it would be short if the eighteen cords were not there. That witness told him he would take it back if it was his own. That they went and looked at it, and there was only a few sticks here and there that belonged to him. He said he took eighteen cords of cedar, and was willing to return the same amount of cedar. That he told him he wanted his own. The cedar that was removed and piled back there, and which he had delivered on the dock, was not the cedar that Mr. Moss pointed out to him as being his. The plaintiff's evidence was corroborated by that of his son and of a Mr. Thompson. Evidence was given tending to show that the cedar had been disposed of to other parties. Mr. Cockey

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testified that he was president of the *Warehouse & Builders' Supply Company* organized, etc., under the laws of Minnesota, and also of the Warehouse & Builders' Supply Company organized, etc., under the laws of Wisconsin, when the action was commenced. They were not two corporations under the same name.

The evidence on the part of the defendant tended to show that there had been no conversion of the plaintiff's cedar, and that the cedar remaining near the dock, disowned by plaintiff, was the cedar he had landed on the dock in October, 1892; and it appeared that the *Warehouse & Builders' Supply Company*, June 6, 1894, called on the plaintiff to pay for dockage and storage $52 on cedar unloaded on the company's property, and to remove the same. The removal of the eighteen cords from the dock, and piling it in the yard, was November 16, 1892. Evidence was given tending to support the first counterclaim. As to the second counterclaim, it appeared substantially that all the dockage, etc., therein claimed was upon cedar landed by the plaintiff on the dock for Kiever & Burke, under a contract by which they were to pay the dockage and storage on it; and the defendant had charged the same to them, and had never made any charge against the plaintiff, or any claim therefor against him, until after this action had been commenced; that said cedar was to become and be the property of Kiever & Burke as soon as placed on the dock. The defendant put in evidence a general assignment of the dock bills and accounts, dated January 31, 1894, from the Billings Hardware Company to W. P. Cockey, and an assignment of the same to the *Warehouse & Builders' Supply Company*, dated April 27, 1894; also articles of incorporation of the Warehouse & Builders' Supply Company, dated March 26th, and filed in the register's office of Douglas county, March 27, 1894. The corporation was created for "the transaction of a wholesale and retail mercantile business," etc.

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The defendant called as a witness one Schwallenbach, who testified that he was a contractor, and had laid cedar pavement, and was familiar with the price of cedar in the years 1892, 1893, and 1894; and asked him what paving cedar was worth in the city of Superior in 1893. Upon objection, the inquiry was excluded. The same question was asked as to 1894, with the same result, the objection being that the question should have been as to its market value. The inquiry as to its market value was put in various ways, with the result that the witness stated that there was no demand there for home use, and it had no market value there for paving; that there was then no demand for cedar of any kind; that he did not know if there was any demand for cedar outside of Superior; he had not heard of any. He said it could be used for firewood, but this was stricken out. He testified that there was no paving being done, and no one had any occasion for paving cedar, and he did not know what the market value was. He was asked what paving cedar was worth there in the spring of 1894, for any purpose, but the court held he was not competent to testify on the subject.

The defendant asked the court to direct a verdict in its favor, but the court refused the request. The defendant requested the court to give various instructions to the number of fourteen, but, as all of them not manifestly improper or irrelevant were embraced in the general charge, it is not material to state them. The case was submitted to the jury to find a general verdict, and to answer three questions. The jury found for the plaintiff in the sum of $166.05. The questions were answered, in substance, that they allowed $18 for dockage and storage of the cedar in question, and nothing for the dockage of any other cedar, and $184.05 for conversion of the cedar in issue. The plaintiff had judgment on the verdict against the defendant, the *Warehouse & Builders' Supply Company* (a corporation duly organized and ex-

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isting under the laws of Minnesota), from which the defendant appealed.

Frederick H. Remington, for the appellant.

For the respondent there was a brief by *A. T. Rock* and *H. H. Grace*, and oral argument by *Mr. Rock*.

PINNEY, J. The questions in this case are, in the main, questions of fact, and there is evidence sufficient, in our judgment, to sustain the findings of the jury.

1. The defendant, the *Warehouse & Builders' Supply Company*, was sued by that name only, and the complaint was against that corporation "as organized and existing under the laws of Minnesota," and doing business as such in the city of Superior. The judgment is against it as such corporation. There is nothing in the record indicative of a purpose or intention of suing the Wisconsin corporation of that name. The defendant, "*Warehouse & Builders' Supply Company*," for answer to the complaint, denies all the allegations of the complaint, except those expressly admitted, and then the defendant proceeds to claim that it was an entirely different person from the Minnesota corporation and makes a defense on that basis, and makes defenses at the same time, and in the opening part of the answer, against the claims set forth against the Minnesota corporation. The court seems to have considered that the defendant was a Minnesota corporation; and, finally, after quite a considerable mystification over this clever subtlety, the counsel for the defendant, in support of his title to the counterclaims set up, expressed the view that this court would reach the conclusion that the trial court "was right in considering the date of incorporation as immaterial, and that the two corporations were, for all practical purposes, the same." We concur with counsel and with the trial court on this point, and think that both corporations represented and controlled the same rights and interests in Wisconsin, under organiza-

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tions in the respective states. We hold that the action and judgment was against the Minnesota corporation. The cedar, if converted at all, was converted before the Wisconsin corporation was organized.

2. There is sufficient evidence from which the jury might properly find a conversion of the paving cedar, and by the Minnesota corporation defendant, doing business in Wisconsin. The question whether there was a conversion of the cedar was fairly submitted to the jury under instructions favorable to the defendant. Indeed, this was the principal question in the case, and, as there was conflicting evidence, this court will not disturb the finding of the jury.

3. There was no error in refusing the fourth, fifth, and eleventh requests on the part of the defendant to charge the jury. There is nothing to show that the plaintiff's cedar was lost or misappropriated through any silence or fault on the part of the plaintiff, or that he knew or supposed that the defendant, or its officers, were ignorant of any intermixture of it with cedar belonging to the defendant or other parties. Its duty, as bailee, was a plain one, namely, to keep the property, as delivered on the dock, separate from all other property. If it failed to do so, and converted the property to its own use, it is certainly liable in damages. The court stated to the jury what would constitute a conversion, to which no exception was taken. It could not properly, under the state of the evidence, say to the jury that there had been no conversion of the cedar. Even if the same kind of cedar remained in the yard, the plaintiff was not bound to take it as his own; but the uncontradicted evidence was that it was not of the same quality. There was no evidence to show that the plaintiff wilfully or indiscriminately intermixed his cedar with that of the defendant or of others. The evidence shows clearly that whatever intermixture may have occurred, was through the acts of the defendant.

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4. The court did not rule that the defendant's witness Schwallenbach could not testify what the market value of paving cedar was at the times mentioned. Inquiry in this respect was freely permitted. Paving cedar is an article of general merchandise, and the inquiry as to its market value is a practical method of ascertaining what it was worth. We think that it was proper to ask the witness what paving cedar was worth at the times named, but his evidence showed that he did not know of any demand for it for home use at Superior city or elsewhere,—he had not heard of any; that there was no paving being done in Superior city, and he did not know what its market value was. He had testified that he knew the prices for paving cedar during the years named, but the defendant's counsel abstained from asking what such prices were. We do not think it can be said that the defendant was prejudiced by the rulings complained of. He did not know of any market value for the cedar, and the defendant got substantially the benefit of all he did know, except as to prices, which it might have had, presumably, if it had desired it. What *paving* cedar was worth for firewood was not a proper rule of damages for its conversion. We think that the rulings complained of present, in view of the facts and circumstances of the case, no reversible error. We do not think there is any reason for supposing that they injuriously affected the substantial rights of the defendant, or that the judgment should be reversed on account of these rulings. R. S. sec. 2829; *Bosworth v. Tallman*, 66 Wis. 22; *Thorn v. Smith*, 71 Wis. 18; *Renier v. Dwelling House Ins. Co.* 74 Wis. 89–99.

5. The evidence of Burke clearly showed that the plaintiff did not use the dock to land the cedar for Kiever & Burke, but that they had its use for that purpose, and that the plaintiff was not liable for the dockage thereon. The loss of the contract between them and the plaintiff was shown, and parol evidence was rightly admitted to show that they

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were to pay such dockage, and the defendant had charged it to them, and not to the plaintiff. About these facts there was no conflict of evidence. The court left it to the jury to find whether there was cedar placed on the dock by the plaintiff, other than that in issue, and other than the Kiever & Burke, etc., cedar, and, if so, to allow the defendant fifty cents per cord thereon, and interest for two years at six per cent.; but the jury found against the defendant on this claim. The question as to what amount was due for the dockage on the cedar in dispute was rightly left to the jury upon the evidence.

6. The only evidence as to the value of the paving cedar was that it was of the value of $10 per cord. The court rightly told the jury to allow that sum for the amount of paving cedar they should find had been converted, with interest at six per cent. for five months, being from the time the action was commenced. We do not find that there is any reversible error in the record.

By the Court.— The judgment of the superior court is affirmed.

MILLER, Respondent, vs. PALMER, Appellant.

February 26 — March 16, 1897.

Rescission of contract: Conversion.

A debtor who, to secure his sureties in a bond to his creditor, has given them a bill of sale of the property bought from such creditor, they agreeing to take proper care of the property, dispose of it to the best advantage, and collect his accounts, and, after paying expenses, pay the balance to the creditor until he is fully paid, and return the remainder, if any, to the debtor, cannot, after such sureties have paid over a part of the proceeds of the property to the creditor, rescind the contract and revest the title of the property in himself by demanding a return thereof, because of the refusal of such sureties to pay over the balance to the creditor; nor can he, after making such demand, maintain an action against them for the conversion of the property.

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Miller vs. Palmer.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Reversed.*

In May, 1893, the plaintiff was engaged in the business of selling sewing machines, at Duluth, Minnesota. He was handling the machines manufactured by the White Sewing-Machine Company. He, as principal, and the defendant with others, as sureties, executed to the White Sewing-Machine Company a bond in the penal sum of $3,000, conditioned to pay to the obligee, or its assigns, "any and every indebtedness or liability now existing or which may hereafter exist or be incurred by the said *Miller*." After the execution of this bond, the plaintiff bought sewing machines and supplies from the White Sewing-Machine Company, whereby he incurred a large indebtedness. He became embarrassed in his business, and was unable to meet his payments. The company pressed him, and demanded payment from his sureties. In these circumstances he voluntarily turned over to his sureties a considerable amount of property, consisting of sewing machines, sewing-machine supplies, and accounts, by an absolute bill of sale. They gave him a receipt therefor, expressing that they would take proper care of the property, and dispose of it to the best advantage, and collect the accounts, and, after paying expenses, pay the balance to the White Sewing-Machine Company until it was fully paid, and the balance, if any, to the plaintiff. Some of the accounts were collected, and some of the machines were sold. Of the moneys realized, some was used for paying expenses, some was paid to the White Sewing-Machine Company, some was on hand. An action on the bond was pending in the courts of Minnesota against the plaintiff and all his sureties. All the defendants in that action were defending. The plaintiff, believing that the defendant, who was in possession of the property, intended to hold it to indemnify himself and the other sureties against the costs and expenses of that action, instead of paying the

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obligation with it, demanded a return of the property, saying that he would settle with the company. The defendant refused to surrender, and the plaintiff brought this action as for a conversion of the goods. The plaintiff had judgment, from which this appeal is taken.

For the appellant there was a brief by *A. C. Titus*, attorney, and *C. T. Crandall*, of counsel, and oral argument by *T. L. McIntosh*.

For the respondent there was a brief by *A. B. Ross* and *L. T. Powell*, and oral argument by *Mr. Ross*. They contended that the repudiation of the agreement by the appellant justified a rescission thereof by the respondent. *Keys v. Harwood*, 2 C. B. 905; *Shaw v. Turnpike Co.* 2 Pa. (P. & W.), 454; 2 Parsons, Contracts, 679. The demand for a return of the property amounted to a rescission on the part of the respondent. The appellant's holding the property for purposes inconsistent with the agreement and with the rights of the respondent was a conversion. *Nutter v. Varney*, 5 Atl. Rep. 457; *Hamilton v. McLaughlin*, 145 Mass. 20; *Haas v. Damon*, 9 Iowa, 589; Cooley, Torts, 448.

NEWMAN, J. In order to recover in an action for the conversion of goods, the plaintiff must have the title, general or special, of the goods, and the right of immediate possession. 26 Am. & Eng. Ency. of Law, 744. Whether the transaction by which the goods came to the possession of the defendant be considered the creation of a trust to apply the proceeds of the goods and accounts to the payment of the plaintiff's debt to the sewing-machine company, or a mortgage for the security and indemnity of the sureties on his bond, it transferred the title to the goods. *Hill v. Merriman*, 72 Wis. 483. The transaction evidently included both purposes. The title would, in ordinary cases, remain in the grantee or mortgagee until the purpose contemplated had been fulfilled. It is not easy to see how the plaintiff

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has become reinvested with the title. The purpose has not yet been fulfilled. His mere demand could not revoke the title. If the transaction be held to create a trust, still the trustee has a beneficial interest to be protected. If he failed to execute the trust or misapplied the fund, it would seem that the remedy would be in equity to compel its execution. But it is understood that it is claimed that the plaintiff's demand for a return of the goods worked a rescission of the transaction, and revested the title to the goods in him. No doubt it might have this effect if he was, in the circumstances, entitled to make compulsory rescission. Ordinarily, it requires the consent of both parties to rescind a contract, as well as to make one. But there are some exceptions. If the contract has been procured by the fraud of one party, the other party may rescind the contract on discovery of the fraud, by giving prompt notice of rescission, or the institution of an action. The only fraud hinted at is the failure to apply the fund to the purposes intended. If this was in pursuance of a preconceived intention not to apply the fund to the purpose, it is a fraud which might justify a rescission. But, in order to have that effect, the fraudulent intent must have existed at the time of the making of the contract (*King v. Brown*, 24 Ill. App. 579; *Bidault v. Wales*, 20 Mo. 546), and is not proved by the fact alone of nonperformance (*Patterson v. Wright*, 64 Wis. 289). So, also, the nonperformance of the contract by one party will, in some circumstances, afford ground for its rescission. The more common case is where the nonperformance by one party disables the other party to perform on his part. In that case the party disabled is excused from performance on his part, and may, at his option, treat the contract as rescinded. But this option does not arise where the failure to perform is only partial, and there remains a distinct part of a subsisting and executed consideration. In such a case the remedy of the injured party is by an action on the contract itself. *Selby v.*

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Hutchinson, 9 Ill. 319–333; *Weintz v. Hafner*, 78 Ill. 27; *Burge v. C. R. & M. R. Co.* 32 Iowa, 101; *Myer v. Wheeler*, 65 Iowa, 390; *Stevenson v. Polk*, 71 Iowa, 278; 2 Parsons, Cont. 679; 21 Am. & Eng. Ency. of Law, 46.

The defendant has partly performed his undertaking. He is still liable as a surety on the plaintiff's bond. That is, in part, the executed consideration upon which the transfer of the goods was made. An action on the contract, if there is a breach of it, will afford the plaintiff complete relief. So it is held that his demand for the return of the goods did not operate as a rescission of the contract, so as to revest the title in the plaintiff; and that the plaintiff has no sufficient title to maintain his action as for a conversion of the goods.

By the Court.— The judgment of the superior court of Douglas county is reversed, and the cause remanded for a new trial.

THE STATE EX REL. FARRELL, Appellant, vs. HOWE and another, Respondents.

February 27 — March 16, 1897.

Amendatory statutes: City of Superior, license fee in.

Prior to the constitutional amendment of November, 1892, prohibiting the amendment of city charters by special acts, the charter of the city of Superior fixed the license fee for the sale of intoxicating liquors therein at "not less than $500, any general law of the state to the contrary notwithstanding," and that provision of the charter has not been changed by any subsequent legislation but still governs the fee for such license in that city. Although sec. 1548, R. S., as amended by ch. 296, Laws of 1885, fixes the license fee generally at $200, yet sec. 6 of said amendatory act provides that it shall not be construed to diminish the sum to be paid for a license in any city or village, as provided by its charter and ordinances, and the effect of ch. 286, Laws of 1893, amending and re-enacting such amended section, is to continue the same in force without any change except as to the time of the commencement and ending of the license year.

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The State ex rel. Farrell vs. Howe and another.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Affirmed.*

The relator applied to the city council of the city of Superior in 1895 for a license for the ensuing license year for the sale of intoxicating liquors in said city. Such proceedings were thereafter duly had that such application was granted, and thereupon the applicant paid to the city treasurer of said city the sum of $200 as license money, upon the theory that such sum was the required amount to be paid in such cases. If such sum was sufficient, the applicant complied with all the conditions precedent to the issuance of his license. After such compliance, such applicant demanded of the proper officers of the city the issuance of his license, which was refused upon the ground that the sum required therefor was $500, as regulated by the charter provisions of the city covering the subject, instead of $200, as provided by the general law of the state. This action was brought to compel such officers to issue the license, and in that way to test the question of whether the charter provision of the city of Superior or the general law governs. Judgment was rendered in defendants' favor, and plaintiff appealed.

For the appellant there were separate briefs by *C. R. Fridley*, attorney, and *Spooner, Sanborn & Spooner*, of counsel, and oral argument by *A. L. Sanborn*. They argued, *inter alia*, that the effect of the constitutional amendment of 1892 was to prohibit all special legislation as to cities, etc., and require general laws to be enacted, and to be uniform throughout the state. Chapter 286 of the Laws of 1893 is a general law, and by its terms it applies to all cities. It is the only law now in force on the subject of liquor licenses, and it can have no validity if it does not apply to the city of Superior as well as to other cities. *State v. Camden*, 50 N. J. Law, 87; *State v. Jersey City*, 54 id. 49; *Haynes v. Cape May*, 52 id. 180; *Johnson v. Milwaukee*, 88 Wis. 383, 387; *Boyd v. Milwaukee*, 92 id. 456; *Palms v. Shawano Co.*

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61 id. 211. Chapter 286 of the Laws of 1893 repealed the law previously in force, and whatever provisions thereof were subsequently in force were so by virtue of their re-enactment. *Goodno v. Oshkosh*, 31 Wis. 127; *State v. Ingersoll*, 17 Wis. 631. A general law repeals an earlier law, or special provisions of an earlier law, with which it is inconsistent. 23 Am. & Eng. Ency. of Law, 426, 484, 485.

Champ Green, for the respondents.

MARSHALL, J. The charter of the city of Superior, prior to the constitutional amendment prohibiting the amendment of such charters by a special act, provided that the license fee for the sale of intoxicating liquors in such city should be "not less than $500, any general law of the state to the contrary notwithstanding." Such provision existed at the times covered by the proceedings involved in this case, and govern the subject, unless changed by ch. 286, Laws of 1893, hereafter mentioned. Sec. 1548, R. S., as amended by ch. 296, Laws of 1885, provided that the license fee for the sale of intoxicating liquors should be $200. In such act of 1885, by sec. 6, it was provided that sec. 1548 aforesaid, as amended by said act, should not be construed to diminish the sum to be paid for a license to sell intoxicating liquor in any city or village in this state, as provided by the charter and ordinances thereof. By sec. 1, ch. 286, Laws of 1893, sec. 1548, R. S., as amended by the act of 1885, was amended in respect to the time of the commencement and ending of the license year, and in no other material particular, and was re-enacted as so amended. Sec. 6 of the act of 1885, which is sec. 1563*a*, S. & B. Ann. Stats., was not changed by the act of 1893, but remained thereafter, as before, in full force.

From the foregoing it clearly appears that there has been no change in sec. 1548, R. S., since 1885, respecting the matters involved in this case. The effect of the act of 1893 was to continue sec. 1548, R. S., as it had theretofore existed in

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all respects, except that in regard to the commencement and ending of the license year. Hence, with such exception, the law speaks from the time of its original enactment. This is governed by principles long settled and firmly intrenched in the jurisprudence of this state. *State v. Ingersoll*, 17 Wis. 631; *Goodno v. Oshkosh*, 31 Wis. 127; *Chapin v. Crusen*, 31 Wis. 209; *Cox v. North Wis. L. Co.* 82 Wis. 141.

The conclusion being reached that the act of 1893 is a mere continuation of sec. 1548, as amended by the act of 1885, relating to the amount required to be paid for the license, the contention that such act, unless applicable to all charters, is unconstitutional, as special legislation, does not arise.

It follows from the foregoing that the amount chargeable for a license to sell intoxicating liquors in the city of Superior at the time in question was governed by the charter provision of such city, which leads to an affirmance of the judgment.

By the Court.— Judgment affirmed.

LARSSON, Respondent, vs. MCCLURE, Appellant.

February 27 — March 16, 1897.

Master and servant: Risk assumed.

A laborer, engaged in shoveling gravel from a gravel pit, who, having knowledge of the liability of the gravel on the face of the pit to fall down as excavation proceeded at the bottom, and of the fact that blasting was being resorted to in order to break off the frozen surface, continues to work in the pit, must be held to have assumed the risk of injury from the falling of the bank at the place where he was working, as incident to his employment, and he cannot recover from his employer for an injury caused thereby.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Reversed.*

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This action was brought to recover damages for a personal injury sustained by the plaintiff while working as a common laborer in a gravel pit for the firm of Mitchell & McClure, and by reason of their alleged negligence in not furnishing him with a safe place to work, and in not notifying him of the danger to which he was exposed where he was directed to work, and of which he had no knowledge. The bank by which he was working in the gravel pit caved in upon him, and in consequence his leg was fractured, and he sustained other injuries, etc. The action was brought against the defendant, *McClure*, as surviving member of the said firm, and he answered, denying the principal allegations of the complaint, and alleging that the plaintiff's injuries were caused by and through his own negligence.

It appeared that the plaintiff, at the time of his injury, January 18, 1895, had worked on Mitchell & McClure's railroad about eight days, and was then engaged in loading gravel upon cars in a gravel pit four or five cars in length; that he commenced in the morning, and had worked at the back car, but was directed by the boss, Sam Erickson, who hired the men, to go forward about 100 feet, where he had worked only about half an hour, when he got hurt. There was frost in the ground, and they had to blast the bank, so that they could get the thick crust off, and take the bank down, and get sand and gravel. Charles Erickson did the blasting, commencing at the west corner, working east, and removing the frozen crust; and the plaintiff testified that he could not see whether he had removed the frozen crust in front of the bank; that he was at work, shoveling, about six or eight feet from the edge of the frozen crust, when the bank fell down, and struck him on the left leg, so that he fell over, and received the injuries complained of; that he did not see the bank falling before it struck him,— it came so quick. The plaintiff had worked at railroad work and in gravel pits for three years before. And he further

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testified, in substance, that in the present instance, to get the frozen part off, they dug along with crowbars, and lifted it away; that Charles Erickson helped the boss, Sam Erickson, to get the gravel loose,—to blast it; that he went on top of the bank with a drill and put in blasts, and when he got ready to explode them they all went away; that he had fired five or six blasts that morning; that when they began to blast, the bank was straight up and down, and that they all shoveled up gravel right along the bank; that a blast was fired a short time before he got injured, and that just before the blast he had got right up under the bank; that the boss told them when the blast was to come off, and then they went away, and, when he told them, they all came back; that when they got back after that explosion the boss told them all to take the same places; that half an hour after the blast he got hurt; and that at that time some big chunks had fallen down, and there was loose gravel in the bottom, which he was getting out, when the bank fell, while he was close under, and within a foot of, the bank. Further, that the frost in the bank was a foot or so thick, and that he did not see the chunk before it fell, and could not tell, from looking up there, that it was loose,—could not say whether any one could, by looking up there from down below; *that he did not see any cracks in the bank, nor look for any;* that the chunk that fell projected out from the bank about two feet, and when he went back to work he looked, and did not see anything dangerous, and kept on shoveling sand from the bottom near the bank; that Charles Erickson did not say anything to Sam Erickson before he (plaintiff) got hurt,—did not hear him say that they ought to take the chunk down.

Charles Erickson testified that he stood right by the plaintiff when he got hurt; that the bank was frozen nearly three feet deep; and that the frozen part had to be removed and piled before the men could shovel. The blast-

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ing would loosen the crust, and it made big cracks in it; and after the crust had been removed the men would shovel the sand. The bank was nine feet high. We had just taken what frozen earth the blast threw off, and put it in a pile back of where the men were shoveling. The plaintiff was about ten feet from the east end. It was all solid there. Further to the east end, the crust had not been removed. That he (witness) had been blasting on top where the plaintiff got hurt, and he asked the foreman or boss if he would let him take the crust off. That he was then standing about five feet from the plaintiff. The crack was at the top, and came out in front, and ran towards the east along the bank, and it came down the front of the bank nearly to the bottom. It was about nine feet long, and the piece was standing up. The foreman said I was not boss, and to keep still. He told the men to keep to work. At this time the plaintiff went right in there to work. The foreman, Sam Erickson, set him to work there, and the plaintiff went to shoveling and loading the cars from the bank where we had taken off the crust. The foreman saw the crack, and said he did not think it would come down, and plaintiff shoveled there half an hour, when the frozen chunk came down on him. It was nine feet long and two and a half feet thick. He also testified that he did not tell the plaintiff that it was dangerous there, and did not know that it was; that he did not call the plaintiff's attention to the cracks; that he called out in a loud voice to the foreman, and said, "Erickson, will you let me take down that frost?" and told him it was dangerous, and spoke in English; that he said, "You have got to watch out for that,— it will fall down on them;" that he told the plaintiff to look out for that piece,— that it might fall off and hurt him; that he spoke in English, and he understood; that he stood there for fifteen minutes, and then it fell down on him; that there was no trouble in seeing the cracks there from below; they were one inch wide, and they

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extended up and down the bank nine feet; that he could see them plainly from where he was standing, off towards the engine, and he went up to the bank where *Larsson* was, and saw the cracks there, and he was there with him, but did not call *Larsson's* attention to it. He testified that the plaintiff understood some English; that when he told him to look out for the chunk he did not stop work; that Sam Erickson had charge of the work there, and run the crew, and employed the men to work there when they came out. Mitchell and *McClure* were not there.

The defendant moved for a nonsuit, which was denied. At the close of the testimony the defendant asked the court to direct a verdict in his favor, but this was denied. The plaintiff had a verdict for $337, upon which judgment was entered in his favor, and from which the defendant appealed.

The cause was submitted for the appellant on the brief of *Knowles, Dickinson, Graham & Wilson.* They argued, *inter alia*, that the place where the plaintiff was injured was one the preparation and keeping safe of which was a part of the work the plaintiff and his fellow workmen were employed to perform. *Petaja v. Aurora Iron Mfg. Co.* (Mich.), 64 N. W. Rep. 335; *S. C.* 66 N. W. Rep. 951; *Farwell v. B. & W. R. Corp.* 4 Met. 49; *Peschel v. C., M. & St. P. R. Co.* 62 Wis. 338; *Benn v. Null*, 65 Iowa, 407; *Beesley v. F. W. Wheeler & Co.* 103 Mich. 196; *Coal & Mining Co. v. Clay's Adm'r*, 51 Ohio St. 542. The danger was open to the observation of the overseer and the workmen alike, and the injury was one incident to the business. *Vincennes W. Supply Co. v. White*, 124 Ind. 376; *Griffin v. O. & M. R. Co.* id. 326; *Pederson v. Rushford*, 41 Minn. 289; *Rasmussen v. C., R. I. & P. R. Co.* 63 Iowa, 236; *Olsen v. McMullen*, 34 Minn. 94; *Naylor v. C. & N. W. R. Co.* 53 Wis. 661; *Hobbs v. Stauer*, 62 id. 108; *Strahlendorf v. Rosenthal*, 30 id. 674; *Behm v. Armour*, 58 id. 1; *Simmons v. C. & T. R. Co.* 18 Am. & Eng. R. Cas. 50.

T. L. McIntosh, for the respondent.

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PINNEY, J. The plaintiff, in entering upon the employment in which he was engaged when injured, assumed all risk or danger of injury ordinarily and fairly incident to such service. When the danger is alike open to the observation of all, both the master and servant are upon an equality, and the master is not liable for an injury resulting from the dangers incident to the employment. *Naylor v. C. & N. W. R. Co.* 53 Wis. 661; *Showalter v. Fairbanks, Morse & Co.* 88 Wis. 377; *Paule v. Florence Mining Co.* 80 Wis. 350. The plaintiff was familiar with the kind of work he was required to perform, and had had considerable experience in working in gravel pits, and had worked on railroads. He knew that blasting was being resorted to to break down the frozen bank, and to get at the sand and gravel where he worked; and five or six blasts for that purpose had been set off on the day in question, and before he was injured. He had witnessed and understood the effect they produced in shattering the bank in front of which he was working, and which was not more than 100 feet in length, rendering it insecure and liable to fall down as excavation proceeded at the bottom. The situation itself suggested to him the dangers incident to the service, and the necessity of proper caution for his own protection. He chose, notwithstanding, to continue work under the circumstances, instead of declining the service, and it is entirely well settled that he must be held to have assumed the risk or danger, so far as it was open for his observation. He testified that after the last blast had been set off where he had been set to work, "I did not see any cracks in the bank; *I did not look to see.*" He was bound to take ordinary care to observe whether any, and what, dangers were incident to his service. "Where the defect or danger is open or obvious, the knowledge of it, on his part, will be presumed or imputed to the servant, as a matter of law; and an adult servant is presumed to possess ordinary intelligence, judgment, and discretion to appreciate such danger, so as to regulate his conduct and

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avoid it; and, if he continues in the service and suffers injury from such danger, he has no right of recovery against the master." *Luebke v. Berlin Machine Works*, 88 Wis. 448, and cases cited; *Haley v. Jump River L. Co.* 81 Wis. 412, 421–425. The evidence of the plaintiff's witness Charles Erickson shows that there had been a serious and dangerous crack about one inch wide in the bank on top, extending along the bank, and down its face at the place where plaintiff was working, that could be readily observed, even from the train; and the witness felt that the situation was dangerous, and warned the plaintiff of it in a loud voice, when standing within five feet of him; but the evidence tends to show that the plaintiff may not have heard or understood him. Whether he did hear or understand, knowledge of a danger so open and obvious is imputed to him by the law. His own evidence shows that he omitted the proper caution, and failed, under circumstances so highly suggestive of danger, of looking out for it.

The danger to which he was exposed was the direct result of the operations of the plaintiff and of his fellow workmen in blasting the bank and in excavating at the foot of it. As they were on the ground, and as the danger was open and obvious, and they had ample facilities to discover and remove it, there would seem to be no ground for holding that the master might not impose such duty on the workmen themselves. *Jones v. Florence Mining Co.* 66 Wis. 275. The case is distinguishable from that of *McMahon v. Ida Mining Co.*, *ante*, p. 308, where the danger was concealed, and the plaintiff had no knowledge of its existence, but was justified in the belief that no danger existed. The present case does not seem to fall within the rule that the master must furnish the servant a reasonably safe place in which to work, inasmuch as the plaintiff and his fellow-servants practically created the place and its attendant perils from hour to hour, in the prosecution of their

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labors; and the condition was constantly shifting by reason of their own acts, of which, as well as their probable consequences, they must be held to have had notice. The negligence, if any, in this view of the case, would be that of the plaintiff and his fellow-servants, and the risk of it must be regarded as assumed by the plaintiff as incident to his employment; and, in any view that may be taken of the case, it must be regarded as a risk assumed by the plaintiff, as incident to his employment. *Petaja v. Aurora Iron Mining Co.* (Mich.), 64 N. W. Rep. 335; *Peffer v. Cutler*, 83 Wis. 281–284. We think, from the undisputed evidence, that the plaintiff must be held to have assumed the risk of the injury of which he complains, and that the circuit court erred in refusing the motion for a nonsuit, and afterwards in refusing to direct a verdict for the defendant.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

DOBIE, Respondent, vs. FIDELITY & CASUALTY COMPANY OF NEW YORK, Appellant.

February 27— March 16, 1897.

Principal and surety: Exoneration.

A surety may, by action in equity, compel his principal to exonerate him by discharging the debt for which both are liable, without first paying it himself.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Affirmed.*

One Knute Anderson obtained a judgment against M. C. Burke and John Burke. The action was for personal injuries. The *Fidelity & Casualty Company* was an insurer of the Burkes against such claims, and was defending the ac-

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tion. It procured *Dobie* and Tennis to become sureties on the appeal, and gave them its own bond in the sum of $7,000 to indemnify them, conditioned to "answer for all damages, interest, and costs, if any, that shall be adjudged" against the defendant, and "to save said Tennis and *Dobie* harmless from all costs and damages on account of their obligation as sureties." Judgment went against the defendant on the appeal, and Tennis and *Dobie* became liable on their undertaking. No part of the judgment has been paid. The plaintiff brings this action to compel the defendant, the *Fidelity & Casualty Company*, to pay the judgment, and so exonerate the plaintiff from liability. The plaintiff had judgment upon the pleadings, according to the demand of his complaint, and the defendant appeals.

The case was submitted for the appellant on the brief of *Ross, Dwyer & Hanitch*, and for the respondent on that of *Thorson & Crawford.*

To the point that in order to recover on a contract to indemnify against liability, the plaintiff must show not only liability but loss, counsel for the appellant cited *Ewing v. Reilly*, 34 Mo. 113; *Maloney v. Nelson*, 144 N. Y. 182; *Churchill v. Hunt*, 3 Denio, 321; *Campbell v. Rotering*, 42 Minn. 115; *Lathrop v. Atwood*, 21 Conn. 117, 123.

NEWMAN, J. The question presented is whether the complaint states a cause of action. The action is by a surety to compel his principal to pay the debt for which both are liable, for the exoneration of the surety. It is ultimately the defendant's liability. That party is the principal debtor, who is ultimately liable for the debt. The question is whether a surety can, in equity, compel his principal to exonerate him from liability, by extinguishing the obligation, without having first paid it himself. It seems to be well settled that a surety against whom a judgment has been rendered may, without making payment himself, proceed in

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equity against his principal to subject the estate of the latter to the payment of the debt, in exoneration of the surety. 2 Beach, Mod. Eq. Jur. § 903; 3 Pomeroy, Eq. Jur. § 1417; Willard, Eq. Jur. 110; *United N. J. R. & C. Co. v. Long Dock Co.* 38 N. J. Eq. 142; *Beaver v. Beaver*, 23 Pa. St. 167; *Gibbs v. Mennard*, 6 Paige, 258; *Warner v. Beardsley*, 8 Wend. 194; 7 Am. & Eng. Ency. of Law, 486, cases in note.

By the Court.— The judgment of the circuit court for Douglas county is affirmed.

JOHN R. DAVIS LUMBER COMPANY, Respondent, vs. HOME INSURANCE COMPANY OF NEW YORK and another, Appellants.

January 15 — April 7, 1897.

Insurance: Agent's authority: Demurrer for misjoinder of actions: Submission of special questions to jury.

1. The objection that the complaint misjoins causes of action which do not "affect all the parties to the action" can, under sec. 2649, R. S., be raised only by a demurrer on that ground, and if not so raised it is waived. Neither a general demurrer on the ground that the complaint fails to state a cause of action, nor a demurrer *ore tenus* at the trial, is sufficient for that purpose.

[2. The question of the validity of ch. 235, Laws of 1893, allowing the joinder of independent causes of action, not decided.]

3. If policies of insurance have been delivered to the insured without prepayment of the premiums, and credit given therefor, they must be held to be in force, subject to the right of the insurer to cancel them by notice.

4. There is no presumption that an agent to procure insurance policies has authority, after he has procured and delivered them to the insured, to receive notice of cancellation and to surrender and discharge the same, but in an action on such policies that is a question for the jury.

5. In submitting questions of fact to the jury, it is sufficient that the questions proposed by a party are fairly submitted in substance, though changed in form.

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John R. Davis Lumber Co. vs. Home Ins. Co. of New York and another.

APPEALS from judgments of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

The action is on two policies of fire insurance — one each — issued by the two defendant corporations upon the plaintiff's property at Phillips, Wisconsin. The two insurance companies were joined in the action, as defendants, under ch. 235, Laws of 1893. The plaintiff had large mills, factories, and other buildings, and large quantities of lumber, on which it carried a large amount of insurance. One E. H. Winchester was for several years carrying on a large insurance business at Phillips. He was the local agent for a large number of insurance companies. He was not the agent of the defendant companies. He had been employed largely by the plaintiff to procure insurance on its property. In order to procure the amount of insurance desired by the plaintiff, Winchester applied to Messrs. Sunderland & Ostrander, agents for the defendant companies at Superior, Wisconsin, and procured from them the policies on which this action is based. The action of their agents in issuing the policies was unsatisfactory to the home offices, and they were ordered to cancel the policies. June 15, 1894, Winchester went to the plaintiff's office, and, in the absence of plaintiff's officers, procured the policies from the plaintiff's bookkeeper, and returned them to Sunderland & Ostrander. He says that he told the bookkeeper that the policies were wanted for the purpose of cancellation. But this the bookkeeper denies. By the policies, there was reserved the right to cancel them on five days' notice. Before the expiration of five days, and on June 19, 1894, a fire occurred which destroyed a part of the property mentioned in the policies. At the time of the fire no premiums upon these policies had been paid. The plaintiff had an arrangement with Winchester whereby time was given for the payment of premiums on all its insurance procured from him. Directly after this fire, plaintiff deposited the amount of the premiums on

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these policies with Winchester, who forwarded it to Sunderland & Ostrander, who returned it to Winchester.

The principal defense to the action was that the policies had been surrendered and canceled, and were not in force at the time of the loss. At the opening of the trial the defendants moved for a nonsuit on the ground that the complaint did not state a cause of action, and that two causes of action had been improperly joined, and asking for separate trials, all of which was denied. The court proceeded to try both causes of action by one jury, took a special verdict, and rendered a separate judgment against either defendant. At the close of the plaintiff's testimony the defendants again moved a nonsuit, on the ground that the plaintiff had failed to prove the payment of the premiums. This motion was denied. The defendants asked for the submission of several questions, proposed by them, in the special verdict. The court did not submit these proposed questions, but submitted others instead. The special verdict was as follows: "(1) Was E. H. Winchester in June, 1894, the agent of the plaintiff to receive notice of cancellation of insurance policies held by the plaintiff? Answer. No. (2) Was E. H. Winchester in June, 1894, the agent of the plaintiff to surrender for cancellation policies of the plaintiff, and waive the right of the plaintiff that the policies should remain in force for five days after the notice of the cancellation? Answer. No. (3) Did the plaintiff on the 16th day of June, 1894, voluntarily surrender the policy numbered 786 issued to it by the *Home Insurance Company of New York*, for cancellation, and waive its right to have said policy remain in force five days after notice of cancellation? Answer, No. (4) If the court should be of the opinion that the plaintiff is entitled to recover, at what sum do you assess his damages? Answered by direction of the court, as to the *Home Insurance Company*, $1,187." The verdict in each case was the same, except as to the amount of recovery. A

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several judgment was rendered against each defendant, from which they severally appeal.

For the appellant the *Union Assurance Co.* there were briefs by *Haring & Frost* with *E. W. Frost*, of counsel; and for the appellant the *Home Insurance Co.* there was a brief by *Barbers & Beglinger*; and the cause was argued orally by *E. W. Frost* and *Charles Barber*. They argued, *inter alia*, that the defendants were joined as such in violation of their constitutional rights, and that ch. 235, Laws of 1893, was unconstitutional, in that it compelled trials together of several issues, even though the defenses were so unlike that justice required them to be tried separately. *Norval v. Rice*, 2 Wis. 22; *May v. M. & M. R. Co.* 3 id. 219; *Haskins v. Wilson*, 5 id. 106; *Gaston v. Babcock*, 6 id. 503; *Stillwell v. Kellogg*, 14 id. 461; *Mead v. Walker*, 17 id. 189; *Connecticut Mut. L. Ins. Co. v. Cross*, 18 id. 109; *Dane Co. v. Dunning*, 20 id. 210; *Crocker v. State*, 60 id. 553; *Jackson v. State*, 81 id. 131; *Klein v. Valerius*, 87 id. 54; *Von Baumbach v. Bade*, 9 id. 559; *Plumer v. Marathon Co.* 46 id. 163; *Whittaker v. Janesville*, 33 id. 76. The policies were forfeited by nonpayment of premiums. *Thompson v. Insurance Co.* 104 U. S. 252, 261; *New York Life Ins. Co. v. Statham*, 93 id. 24; May, Insurance (3d ed.), § 360 F. The agent who procured the policies had authority to cancel and did cancel the same before the loss. *Schauer v. Queen Ins. Co.* 88 Wis. 561; *Hartford F. Ins. Co. v. Reynolds*, 36 Mich. 502; *Mallory v. Ohio Farmers' Ins. Co.* 90 id. 112; *Stone v. Franklin F. Ins. Co.* 105 N. Y. 543; *Buick v. Mechanics' Ins. Co.* 103 Mich. 75; *Standard Oil Co. v. Triumph Ins. Co.* 64 N. Y. 85; *Newark F. Ins. Co. v. Sammons*, 11 Ill. App. 230; *McCartney v. State Ins. Co.* 33 Mo. App. 652. He was expected to supply the places of policies expired or canceled, and the plaintiff ratified his acts by accepting new policies after others had been surrendered by him and canceled. Mechem, Agency, §§ 148, 177; *Paine v. Wilcox*, 16 Wis. 202, 218. The

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questions submitted to the jury covered only a part of the controverted issues. *Pratt v. Peck*, 65 Wis. 463, 471; *Kerkhof v. Atlas Paper Co.* 68 Wis. 674.

For the respondent there were briefs by *Phillips & Hicks*, attorneys, and *M. H. Beach* and *Moses Hooper*, of counsel, and oral argument by *M. C. Phillips*, *E. R. Hicks*, and *M. H. Beach*. They contended that ch. 235, Laws of 1893, was a reasonable and valid exercise of legislative power. The recital in the policies of the payment of premiums was *prima facie* evidence of that fact, and cast the burden of proof of non-payment upon the defendants. Credit given by the insurance agent was equivalent to payment. *Whiting v. Miss. V. M. Mut. Ins. Co.* 76 Wis. 592, 598; *Scheufler v. Grand Lodge A. O. U. W.* 45 Minn. 256; *Elmer v. Mut. Ben. L. Asso.* 19 N. Y. Supp. 289; Ostrander, Fire Ins. § 87. The insurance agent had no authority to act for the insured in the matter of surrendering and canceling the policies. He took them without authority. *Body v. Hartford F. Ins. Co.* 63 Wis. 157. When he had procured the policies his authority ceased. *Hermann v. Niagara Ins. Co.* 100 N. Y. 411; *White v. Connecticut F. Ins. Co.* 120 Mass. 230; *Indiana Ins. Co. v. Hartwell*, 100 Ind. 566; *Broadwater v. Lyon F. Ins. Co.* 34 Minn. 465; *Quong Tue Sing v. Anglo-Nev. Ass. Corp.* 86 Cal. 566; *Grace v. Am. Cent. Ins. Co.* 109 U. S. 278; *Mut. Ass. Soc. v. Scottish U. & N. Ins. Co.* 84 Va. 116. He received his entire compensation from the insurance companies, and was their agent. *Schomer v. Hekla F. Ins. Co.* 50 Wis. 575; *Knox v. Lycoming F. Ins. Co.* id. 671; *Alkan v. N. H. Ins. Co.* 53 id. 136; Ostrander, Fire Ins. 156. The objection as to misjoinder of causes of action, not being taken by demurrer, was waived. *Cary v. Wheeler*, 14 Wis. 281, and cases cited.

The following opinion was filed February 2, 1897:

NEWMAN, J. The first error alleged is the denial of the defendants' first motion for a nonsuit, and compelling a joint

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trial. This motion was based on the claim that there was a misjoinder of causes of action and of parties defendant. It is clear that, aside from the provisions of ch. 235, Laws of 1893, it is not permissible to join in one complaint causes of action which do not "affect all the parties to the action." R. S. sec. 2647. It is manifest that neither of the causes of action stated in the complaint affects both defendants. Neither defendant is affected, even in a slight degree, by the cause of action stated against the other. So, but for the statute referred to, the objection must be sustained, if properly taken. But the only permissible way to raise the objection is by a demurrer to the complaint on that ground. R. S. secs. 2649, 2654. It cannot be raised by a general demurrer on the ground that the complaint fails to state a cause of action. Nor by a demurrer *ore tenus*, or objection at the trial. *Nevil v. Clifford*, 55 Wis. 161. It is waived if not taken by demurrer on that ground. Having been once waived, the right to object on that ground is gone forever. It can neither be recovered nor revived. So the right to join the two independent causes of action does not at all depend on the validity of ch. 235, Laws of 1893. The defendants have consented. The validity of that act is not involved in this appeal.

The second error alleged is the denial of the defendants' motion for a nonsuit at the close of the plaintiff's testimony. This is upon the ground that the plaintiff had not proved that the premiums had been paid. Receipt of the premiums was acknowledged in the policies themselves. The defendants had set up as a specific defense the failure to pay the premiums. No doubt, the recital of the payment of the premiums, in the policies, was *prima facie* evidence that they had been paid. *Whiting v. Miss. V. M. M. Ins. Co.* 76 Wis. 592. The answers admit the execution and delivery of the policies, and seek to avoid them by the affirmative defense of a want of consideration. No doubt, the burden of

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proving this defense is upon the defendant. If the premiums had not been in fact paid, yet, as the policies had been delivered to the plaintiff without prepayment, and credit given, they must be held to be in force, subject to the right of the defendants to cancel them by actual notice to the plaintiff, or to an agent authorized to receive it. Whether Winchester was such an agent, so that notice to him was notice to the plaintiff, was the leading question litigated on the trial, and there was, no doubt, sufficient testimony to require this question to go to the jury. But the payment, or otherwise, of the premiums was not the test of the liability of the defendants. The policies had been actually delivered to the plaintiff, and by that fact a credit given. The defendants could cancel them immediately, on the ground of nonpayment of premiums, only by giving actual notice to the plaintiff, or to an agent who was authorized to receive it. For cancellation on other grounds the policy provided for a notice of five days. Whether Winchester was such an agent as had power to bind the plaintiff by accepting notice of cancellation depends upon the terms and conditions of his employment. And there is no presumption that authority remains in the agent, who is not also a general agent to place and manage insurance on his principal's property, after he has procured and delivered the policy,— to surrender or discharge it. *Hermann v. Niagara F. Ins. Co.* 100 N. Y. 411; *Karelsen v. Sun Fire Office*, 122 N. Y. 545; *Wilber v. Williamsburgh C. F. Ins. Co.* 122 N. Y. 439. It was no case for a nonsuit. Here was a question for the jury.

As stated, the principal contention in the trial court, as here, was over the question whether Winchester had power, by reason of his employment, to bind the plaintiff by his acceptance of notice of the cancellation of the policies, or by his surrender of them for cancellation, under the circumstances shown by the testimony. The extent and scope of his au-

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thority was in dispute. The facts did not raise a conclusive implication of such authority. If he could bind the plaintiff by accepting notice of cancellation, or by surrendering the policies, it is undisputed that this was done before the fire. In that case the policies had ceased to be in force before the fire. If he had no such power, the policies were still in force at the time of the fire. So this was the turning point of the controversy. The real scope and extent of his employment was a controverted issue of fact for the jury. It was the office of the special verdict to submit to the jury, by proper questions, this issue of fact. It was the office of the court to answer the questions of law which should arise on the facts found by the jury.

The defendants claim that the issues of fact were not submitted to the jury fairly. This is on the ground, mainly, that certain questions which the defendants asked to have submitted to the jury were not submitted in the form requested. No doubt, the defendants were entitled to have this issue submitted to the jury, in substance, as they requested. The *form* in which it shall be submitted is very much in the discretion of the trial court. On this main issue the questions proposed by the defendants and those submitted by the court differ so little in substance that it is a matter of considerable nicety to discriminate between them. The questions submitted seem to have all the substance of the questions proposed, and to differ from them very little except in mere form. A more specific objection is that the court submitted questions of law to the jury. And it is true that the questions submitted involved matters of mixed law and fact. It is not always possible to state questions of fact so cleanly as that they shall involve no implication of law. Indeed, the questions proposed by the defendants have the same infirmity, to an equal, perhaps greater, degree. One of them is this: "Did the business arrangement between the plaintiff and Winchester authorize Winchester

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to receive notice of cancellation of policies for plaintiff?" That seems to be a question of law seriously complicated with the facts. The special verdict fairly submitted this controversy to the jury, and the verdict is fairly supported by the evidence.

The defendants complain that their special instructions were not given. A careful perusal of the charge shows that, so far as they were applicable, the substance of all these requests to charge were given in the general charge, fully and clearly, upon all points bearing on this contention, leaving little, if anything, to be desired.

By the Court.— The judgment of the circuit court is affirmed on both appeals.

A motion for a rehearing was denied April 7, 1897.

CONANT, Respondent, vs. ESTATE OF KIMBALL, Appellant.

January 18 — April 7, 1897.

Receipt in full, effect of: Avoiding.

1. A receipt "in full of all demands to date," given to the owner of a farm by one who had worked on such farm under an agreement that he should be paid by a legacy in the will of the owner, but who had for six years ceased to work on the farm, covers such contract and shows a settlement of all claim for compensation for work under it. Such receipt contains in itself the elements of a contract, and therefore cannot be varied, explained, or contradicted by parol evidence.
2. Such a receipt may be avoided by clear proof of fraud or mistake, but it is not sufficient ground for avoiding it that the person who signed it did not fully understand its legal effect, where no fraud is shown.

APPEAL from a judgment of the circuit court for Fond du Lac county: N. S. GILSON, Circuit Judge. *Reversed.*

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Plaintiff filed a claim in the county court of Fond du Lac county against the estate of Charles F. Kimball, deceased. Such claim was allowed, and the executor appealed to the circuit court. The issue respecting the claim was tried on appeal, and resulted in a finding in substance as follows: (1) Between March, 1873, and December 16, 1886, the deceased was a farmer residing on a farm in Fond du Lac county, during which time the claimant, *Benjamin F. Conant*, performed labor and services for the deceased as a farm hand, which were reasonably worth $2,056.25, no part of which has been paid except $150, the last of which was paid in August, 1891; (2) that such labor and services were performed under an agreement between the parties that *Conant* was to be paid therefor by a legacy to him to be made in the will of said Kimball; (3) that Kimball died November 23, 1893, leaving a will in which there was no bequest to *Conant*. On these findings, and others not necessary to note, the court concluded that *Conant* was entitled to recover $1,906.25, with interest thereon, and costs. Defendant duly excepted to the findings of fact and conclusion of law, and appealed from the judgment entered pursuant to such findings and conclusion.

Edward S. Bragg, for the appellant, took the ground that the alleged agreement as to payment for plaintiff's work was not proved. If there was any such agreement the plaintiff violated its conditions and forfeited compensation. Plaintiff's receipt was conclusive and showed a full settlement of the claim.

For the respondent there was a brief by *Felker, Stewart & Felker*, and oral argument by *F. C. Stewart*. They argued, among other things, that the plaintiff's receipt was open to explanation or contradiction. *Catlin v. Wheeler*, 49 Wis. 523; *Woodman v. Clapp*, 21 id. 353; *Smith v. Schulenberg*, 34 id. 41; *Crowe v. Colbeth*, 63 id. 643; 2 Parsons, Cont. (5th ed.), 556; 1 Greenl. Ev. § 305. On failure of the employer to

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pay by legacy the plaintiff could recover on *quantum meruit*. *In re Bayliss v. Estate of Pricture*, 24 Wis. 651; *Jilson v. Gilbert*, 26 Wis. 637; *Estate of Kessler*, 87 Wis. 660.

The following opinion was filed February 2, 1897:

MARSHALL, J. The findings of the trial court to the effect that the respondent worked for the deceased from 1873 to 1886 under a contract that the latter would compensate the former for his services by a legacy to be made in the latter's will, are challenged as not supported by the evidence, and such exception presents the first question for consideration.

If any contract was established, it was by evidence of declarations made by the deceased during his lifetime, and while the period of service was in progress, indicated by the following: Lydia Zahn testified that Kimball told her he was not paying *Frank* (meaning *Conant*, the respondent) anything, but that he was to have the property when Kimball was through with it. Benjamin Strong testified, in effect, that Kimball stated to him that, if *Conant* stayed with him, Kimball, and his wife, *Conant* would have the farm and everything. J. W. Hall testified, in substance, that Kimball stated to him that when he got through with this world *Frank* would have all that was left of his property. A. C. Jelleff testified, in effect, that Kimball said to him that *Frank* was not working for him exactly; that he said, "It is understood between us that when I am done with the farm he will have it." There was other evidence to the same effect. It establishes that, if the work done by respondent was performed under a contract, such contract clearly was entire, and was to the effect that, if respondent remained with and served Kimball during his lifetime, *Conant* should have what was left of Kimball's property; hence the compensation agreed upon, if any, depended upon full performance on the part of *Conant* of the condition which required him to stay with Kimball during his life. Now, the evidence is undisputed

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that such condition precedent was not performed by respondent. He abandoned the deceased six years or more before his death. To be sure, there is some evidence, not of a very satisfactory character, that deceased made statements from time to time after *Conant* abandoned the former's service, indicating a disposition to pay him for work already done, notwithstanding his failure to remain to the end; but there is no satisfactory evidence that the original agreement, if one was made, was ever changed, while there is considerable evidence to show that it was not changed, and that it was understood between the parties that nothing was due to *Conant* from the deceased, the most important and convincing of which is that shortly before the latter's death *Conant* gave him a receipt, showing a full settlement of all matters between them up to that time for the small sum of $10. An effort was made to avoid the *prima facie* effect of such receipt, but it stands as a strong circumstance in favor of the defendant, and is so persuasive in that regard that, taken with all the other evidence bearing on the subject, we hold that there is no evidence in the record upon which the finding of the trial court under consideration can stand.

But, if we concede that there is not such a preponderance of evidence against the findings of fact, in respect to the contract, that we can say there is no legitimate basis therefor, yet the question must be met, presented by appellant's exception to the findings, in that the trial court did not decide that all the claims and demands on the part of *Conant* against Kimball were fully settled and discharged during the latter's lifetime. The evidence bearing on that question is that prior to October 20, 1893, Kimball was advised by one of his neighbors to get a receipt from respondent, as there was some talk that the latter claimed to have a mortgage on deceased's farm; that, following such advice, deceased visited respondent, accompanied by Mrs. Tabbert, on which occasion the latter said, in Mrs. Tabbert's presence,

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that Kimball did not owe him (respondent) a dollar; that the inquiry first made on this occasion by Kimball was whether respondent had any mortgage on the farm, and the reply was "No," and that deceased did not owe him (*Conant*) a dollar; that thereupon deceased requested respondent to give him a receipt, and make it in full of all demands, and put in $10 as the consideration to make it legal; that thereupon respondent drew, signed, and delivered to deceased an instrument, which is in the following words: "Ripon, Wis., Oct. 20, 1893. Received of C. F. Kimball, ten dollars in full of all demand to date;" that deceased paid to respondent the $10 mentioned in the receipt. Based on such evidence, appellant excepted to the findings, in that the court did not find and decide that whatever claim respondent had for compensation for service rendered Kimball was settled and discharged during the latter's lifetime. Certainly, such conclusion necessarily follows from the evidence mentioned, in the absence of evidence sufficient to impeach the instrument upon the ground of fraud or mistake, and we are unable to find such. Substantially the only evidence in that regard is that of Lydia Zahn, that shortly after the receipt was given deceased told her that he asked respondent to give him a receipt to show that the latter did not have a mortgage on the farm; that deceased told respondent to write the receipt in full, and that he, deceased, put it so respondent did not know what he was doing; that now, though deceased owed respondent, he could pay him what he was a mind to, for he had a receipt in full. Kimball was a man about seventy-nine years old at this time, and was blind. Respondent was a man of intelligence, was possessed of all his faculties, and was of considerable business ability. Such being the case, the evidence of Lydia Zahn as to what Kimball said is entirely insufficient to show that respondent did not know just what was included in the receipt, and that it in express terms covered all demands on his part against the deceased.

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To avoid the force of the instrument, respondent's counsel invoke the very familiar rule that a *mere receipt* is always open to explanation, and may be varied or contradicted by parol evidence; citing *Catlin v. Wheeler*, 49 Wis. 523; *Woodman v. Clapp*, 21 Wis. 353; *Crowe v. Colbeth*, 63 Wis. 643; and other authorities. No citation is necessary to sustain a rule so elementary, but it must be borne in mind that such rule applies only to *receipts*, in the strict sense of the term. *Kellogg v. Richards*, 14 Wend. 116; *Kirkpatrick v. Smith & Co.* 10 Humph. 188. Where the instrument is in the form of and contains all the elements of a receipt, and also includes the elements of a contract, the latter part is governed by the same rules as other contracts, and cannot be varied, explained, or contradicted by parol evidence, though it may be set aside and avoided for fraud or mistake. *Schultz v. C. & N. W. R. Co.* 44 Wis. 638; *Butler v. Regents*, 32 Wis. 124; *Fire Ins. Asso. v. Wickham*, 141 U. S. 564; 1 Greenl. Ev. (Lewis' ed.), § 305, and cases cited; Jones, Ev. §§ 502, 503. A receipt in full of all claims is of such a character. *Henry v. Henry*, 11 Ind. 236, 71 Am. Dec. 354; *Grumley v. Webb*, 44 Mo. 444, 100 Am. Dec. 304. In *Randall v. Reynolds*, 52 N. Y. Super. Ct. 145, the form of the instrument was in full of all matters from the beginning of the world up to this date. The court held that the portion relating to the settlement of all demands up to date constituted a written contract, and could not be varied by parol. It was contended that the instrument was a mere receipt, and could be explained by parol evidence, and shown not to cover all demands. SEDGWICK, C. J., in rendering the opinion of the court, said: "If any part of the receipt was a contract, or of that nature, having a settlement or a release as its object, it could not be explained verbally. The words unambiguously referring to 'all matters between us' are not to be restrained to any particular demand or claims." See, also, 19 Am. & Eng. Ency. of Law, 1122–1124, and notes; *Burke v. Ray*, 40 Minn. 34.

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Some language can be found in cases in this and other courts which, from a casual reading, may appear to be inconsistent with the conclusion that a receipt in full of all demands includes a contract, and is not open to explanation under the rule applicable to mere receipts. Perhaps the distinction between a release and discharge in the form of a receipt in full of all demands and a receipt strictly so called are not clearly maintained, but the apparent disregard of such distinction will disappear, and nothing remain in conflict with the principle here laid down, which is elementary in fact, when the facts of the case in which such apparent disregard occurs are understood. *Smith v. Schulenberg*, 34 Wis. 41, may be cited as an illustration of what is here said. The form of the receipt was, "Received $102.76 in full for all logs up to date." The fact established was that the words "in full for all logs up to date" were included in the receipt by mistake, therefore it was avoided in that respect and on that ground. In discussing the subject, Mr. Justice COLE said "the receipt was open to explanation and contradiction by oral testimony;" that is, as applied to the case, the contract portion of the receipt was subject to be avoided on the ground of mistake established by oral testimony. The rule applied was that applicable to all contracts of settlement; they may be avoided for fraud or mistake. The court obviously did not intend to apply to such instrument the rules applicable to a mere receipt.

The most that is claimed here is that respondent did not know the effect of the receipt, and did not intend to include all claims; but, in view of the fact that he was a man of considerable education and business attainments, was dealing with an old man, who, from blindness and other disability, was incapable of doing business without assistance, there is no evidence to sustain the theory that respondent was imposed upon, or made any mistake in respect to the language used in the instrument. A mere mistake in the legal effect will not do. As held in *Vedder v. Vedder*, 1

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Denio, 257, the mere fact that respondent was not fully aware of the effect of what was required of him does not affect the instrument. He knew, or ought to have known, that what was requested and what he acceded to was an accord and satisfaction of all demands in his favor; and, in the absence of fraud, the court must give legal effect to the instrument. To impeach the settlement for fraud or mistake would require clear and satisfactory evidence; not of mistake merely in respect to the effect of the language used, but mistake in respect to the language contained in the instrument. Obviously no such claim can be made, as such instrument is in the handwriting of the respondent. For that reason we must assume that the trial court looked upon such instrument as a mere receipt, and subject to the rules governing such a paper. Such assumption furnishes the only reasonable explanation we can perceive of how the learned circuit judge reached the conclusion which he did. Considering the instrument as a contract between the parties, it cannot be contended seriously that there is sufficient evidence to avoid it for fraud or mistake.

The result of the foregoing is that the court erred in finding that there was a contract obligation resting on Kimball to compensate respondent after the latter abandoned the service of the former in 1886, and erred in not finding that during the lifetime of the deceased, for a sufficient consideration, the respondent settled, released, and discharged all demands which he had against the deceased. Therefore the judgment of the court must be reversed, and the cause be remanded with directions to enter judgment in favor of the appellant in accordance with this opinion.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded with directions to enter judgment in favor of the defendant for costs.

A motion for a rehearing was denied April 7, 1897.

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SMITH, Respondent, vs. SHERWOOD and another, Appellants.

February 27 — April 7, 1897.

Trial: Absence of judge.

The absence of the trial judge from the court room for any considerable time during the trial of a cause or the arguments to the jury, without the consent of the parties, is a material error, for which the judgment will be reversed and a new trial be ordered.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Reversed.*

This is an action for conversion of a sand pump, sand scow, and appurtenances. The defendants justify the taking of the property upon an execution issued upon a judgment in their favor against one A. K. Smith. It appeared at the trial that A. K. Smith and the plaintiff were brothers, and in 1893 were partners, and owned the property in question as partners, and used it in the business of pumping sand out of the bay at Superior. The plaintiff claims that his brother, A. K. Smith, largely overdrew his account, and that in May, 1894, they settled their partnership accounts, and that A. K. Smith then transferred his share in the property in question to the plaintiff, in consideration of the settlement and release by plaintiff of his claim for such overdraft, which amounted, as claimed, to about $1,200. The defendants claimed that the transaction was void as to them, because they were then creditors of A. K. Smith, and that it was fraudulent as to creditors. A verdict for the plaintiff for $1,800 and interest was rendered, and from judgment thereon the defendants appealed.

For the appellants there was a brief by *McCausland & Smith* and *John Brennan*, and oral argument by *John Brennan* and *E. F. McCausland.*

For the respondent there was a brief by *Crownhart, Owen & Foley*, and oral argument by *W. R. Foley.*

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WINSLOW, J. The first contention made by the appellants is that the verdict is contrary to the evidence. Examination of the record convinces us that there was sufficient evidence to sustain the verdict; hence this objection must be overruled. There are forty-six other errors assigned by the appellants, some of which are again subdivided into lesser and more microscopic errors. He would be an exceptional trial judge who could commit so many errors during the trial of one small case. Many of the errors assigned are of a very trivial nature, and we shall dispose of all but one of them with the general remark that we discover nothing in them which would necessitate a reversal of the judgment.

The one error which remains to be discussed, however, is of a serious nature. It appears by affidavits filed in support of the motion for a new trial that the trial judge was absent from the court room, in an adjoining room, for a considerable time during the closing arguments to the jury. Upon one side it is claimed the judge was absent an hour and a half, and upon the other side it is claimed that the absence was only from twenty to thirty minutes. However this may be, it is undisputed that he was absent for a considerable time. Counsel seem to have improved the time during the judge's absence to indulge in numerous acrimonious discussions. Objections were made to some of the statements made by the counsel who was addressing the jury, and in one instance, at least, the judge was sent for to rule upon the objection, which being done, he returned to the adjoining room. It is claimed by the respondent that all such objections were taken down by the reporter, and are contained in the bill of exceptions, but it is claimed by the appellants that objections were made upon which there was no ruling. Of course, the trial judge could not certify to what took place during his absence from the room, and he does not attempt to do so; nor does he state whether he was within hearing, nor whether his absence was with consent of coun-

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sel, as claimed by respondent, or not. Herein is the vice of the matter. The bill of exceptions is expected to tell the complete story of the trial, from start to finish, and to tell it with absolute correctness. When the trial judge is absent, there is in reality no person or officer who can certify to this court as to what took place during that absence. This court is, and must always remain, in doubt as to the matter; no satisfactory conclusion can be reached from the affidavits of opposing counsel; and thus this period remains a hiatus in the case.

The presiding judge of a trial court is charged with the duty of trying the case from the opening to the close, and he ought not to abdicate his functions even for half an hour. During such an absence grave errors or abuses of privilege may occur, and this court may be left to the conflicting affidavits of overzealous attorneys or parties in interest to determine what in fact took place. This court is not organized or authorized to try such questions, and we do not propose to do so. It avails not to say that error must be affirmatively shown. This is true, but, where the trial court has disabled itself from informing us as to what occurred, how is error to be shown save by affidavit? We cannot but regard this long absence from the bench during an important part of the trial as an error which calls for a new trial. We feel that we should be doing wrong to sanction any such practice. Such a rule, once established, would open the way to dangerous abuses, and break down one of the most valuable safeguards to litigants. Thomp. Trials, § 955; *Brownlee v. Hewitt*, 1 Mo. App. 360; *State ex rel. Gehring v. Claudius*, 1 Mo. App. 551.

By the Court.— Judgment reversed, and action remanded for a new trial.

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CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant, vs. THE MILWAUKEE, RACINE & KENOSHA ELECTRIC RAILWAY COMPANY, Respondent.

February 27 — April 7, 1897.

Eminent domain: Compensation for the occupation of street by railroad.

The construction and operation, on a public street, of an electric railroad extending between several cities or towns, for the transportation of merchandise, personal baggage, mail, and express matter, as well as passengers, is not a mere exercise of the public easement previously acquired by the establishment of such street, but imposes an additional burden thereon, and is a taking of private property, for which the abutting owner is entitled to compensation.

APPEAL from an order of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Reversed.*

The plaintiff is a corporation organized under the laws of this state, and owns and operates by steam power a line of railway, consisting of two main tracks, from Milwaukee to Chicago. Said railway passes through the village of South Milwaukee and the cities of Racine and Kenosha, and is engaged in the carriage of passengers and freight. That within the village of South Milwaukee the plaintiff's said railroad tracks cross Milwaukee avenue, one of the main public streets therein. Milwaukee avenue runs in an east and west direction, and crosses the railroad tracks nearly at right angles. Immediately south of the avenue is the plaintiff's passenger station and depot grounds connected therewith, which station and grounds are necessarily used by the plaintiff in connection with its business and railroad, and the plaintiff is the owner of the whole thereof in fee simple. Such depot grounds abut upon the south side of the said avenue for a distance of 200 feet on the east side of its tracks. On the north side of said avenue, and immedi-

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ately east of the railroad tracks, the plaintiff is the owner in fee simple of a strip of land or right of way fifty feet in width, abutting upon the north side of said public street. The plaintiff is the owner in fee simple of the lands so within the public street to the center thereof on the south side for a distance of 200 feet and on the north side for a distance of fifty feet, subject, however, to the easement vested in the public therein, and the servitude necessarily incident to its occupation and use as and for a public highway.

The defendant, at the dates and times herein mentioned, was, and is now, a corporation organized and existing under and by virtue of the laws of this state, having its principal office and place of business at Racine. It appears by the articles of association of the defendant that it is authorized to build and operate a street railway with a track or tracks and cars to be run thereon for the purpose of carrying passengers, merchandise, personal baggage, mail, and express from a point within the village of South Milwaukee northerly into and through the village of Cudahy, and the towns of Lake and Oak Creek, in the county of Milwaukee, and southerly into and through the town of Oak Creek aforesaid, and into and through the towns of Caledonia and Mt. Pleasant, and the city and county of Racine, and into and through the towns of Somers and Pleasant Prairie, and the city and county of Kenosha.

The defendant, at the time of the commencement of this action, was and is engaged in the construction of a railroad in and through the village of South Milwaukee and along said Milwaukee avenue in said village, and had reached the property, lands, right of way, and tracks of the plaintiff, and had men at work upon the construction of its roadbed in said street, and the laying of ties and rails thereon, and had threatened, and still threatens, that it will construct its road and lay its ties and tracks in said street over and

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across the above-described lands of the plaintiff and its railroad tracks on said lands, and string electric wires over the tracks for the purpose of furnishing electric power for the running of its cars. Until restrained it had actually entered upon the said lands of the plaintiff abutting on said avenue, and had excavated therein, and made grades thereon, for the purpose of constructing its road, and had placed heavy ties on said grade for the purpose of laying the rails of its tracks thereon. The defendant intends to use said railroad, when constructed, for the transportation of freight, mails, and express matter, as well as for passengers. By its articles of association the defendant has the right to use locomotive engines and trains propelled by electric or any other power.

The defendant admits that it is its object and purpose, if it may so lawfully do, to build and operate a street-railway system for the purpose of carrying passengers and personal baggage and other merchandise, mail, and express, under the authority of the proper municipal officers, and subject to such rules and regulations and the payment of such license fees as they may from time to time prescribe, over and along the public streets and highways within the village of South Milwaukee aforesaid, and over and along the highways north and south of said village; that the village board of South Milwaukee, by ordinance, granted authority and permission to the defendant, its successors and assigns, to lay and maintain single or double tracks for a street railway with all necessary switches, curves, turnouts, Y's, poles, wires, and other appliances and conveniences usually employed in the operation of a street-railway system using electric or other power excepting steam, over and upon, along and across those certain streets, bridges, culverts, and public places within the corporate limits of the village described, including Milwaukee avenue, and to operate thereon a street-railway system with electric or other power except-

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ing steam for the carrying of passengers, personal baggage, merchandise, mail, and express, for the term of fifty years.

The supervisors of the town of Oak Creek had given to the defendant like authority; but the plaintiff has not given the defendant its consent or permission to construct such railway upon or across its said lands and railroad, or upon said street in front of said lands, nor to enter upon said lands of the plaintiff in said street for the purpose of grading the same, or laying ties or constructing its railway thereon, or stretching electric wires over and across the same; nor has the defendant entered into any agreement with the plaintiff company as to how and upon what terms such crossing, if made at all, shall be made, or any agreement touching plaintiff's damages on account of such crossing by defendant's road; nor has the defendant taken any steps, by condemnation or otherwise, to acquire the right to cross the plaintiff's said lands and railroad in the manner and for the purpose in which it proposes to cross the same.

The defendant threatens and intends to, and the plaintiff believes that it will, enter upon the plaintiff's said land, and cross its said railroad with the defendant's railroad now being constructed, without the consent of the plaintiff, and without making any compensation to it, unless restrained by the order and injunction of the court. If the defendant shall construct and operate its railroad over and upon and along the plaintiff's lands and railroad, serious and irreparable damage and injury will necessarily result to the plaintiff in its use and enjoyment of said lands and railroad, and in the exercise of its rights and franchises connected therewith.

November 17, 1896, the plaintiff commenced this action to perpetually enjoin the defendant from constructing its said track over and across or upon the said land and the railroad tracks of the plaintiff, or any part thereof, and from in any manner working upon or interfering therewith, and

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from proceeding with the laying of the track of the defendant over and across the railway and lands of the plaintiff, or in any manner interfering with the same during the pendency of this action, or until the further order of the court. January 9, 1897, the plaintiff's motion for a preliminary injunction was denied, with $10 costs of motion. From that order, and the whole thereof, the plaintiff brings this appeal.

For the appellant there were briefs by *Fish & Cary*, and oral argument by *John T. Fish*. They contended, among other things, that the railway sought to be constructed by the defendant has all the characteristics of a commercial railway, and imposes an additional burden upon the street, for which the abutting owners are entitled to additional compensation. *Indianapolis, B. & W. R. Co. v. Hartley*, 67 Ill. 439; *Ford v. C. & N. W. R. Co.* 14 Wis. 609; *Pomeroy v. M. & C. R. Co.* 16 id. 640; *Pennsylvania R. R. v. Montgomery Co. P. R. Co.* 167 Pa. St. 62; *Bohlman v. G. B. & L. P. R. Co.* 30 Wis. 105; *Diedrichs v. N. W. U. R. Co.* 33 id. 219, 221; *Uren v. Walsh*, 57 id. 98, 101.

For the respondent there was a brief by *Kearney, Phipps & Thompson*, attorneys, with *Quarles, Spence & Quarles*, of counsel, and oral argument by *Park Phipps* and *J. V. Quarles*. They argued that, if the right of the defendant to carry freight be disallowed, that would not affect its rights in other respects. Thompson, Corp. § 229; *Becket v. Union B. & L. Asso.* 88 Pa. St. 211; *Albright v. Lafayette B. & S. Asso.* 102 id. 411; *Eastern Plank R. Co. v. Vaughn*, 14 N. Y. 551; *Oregon R. & N. Co. v. O. R. Co.* 130 U. S. 1, 25; *People ex rel. Peabody v. Chicago Gas Trust Co.* 130 Ill. 268; *S. C.* 8 L. R. A. 497, 506. A street railway, unlike a commercial railway, so uses a street as not to exclude or seriously obstruct the common travel. Booth, Street Railway Law, § 83; *Hobart v. Milwaukee City R. Co.* 27 Wis. 194; *Briggs v. Lewiston & A. Horse R. Co.* 79 Me. 633; *Newell v. M., L. & M. R. Co.* 35 Minn. 115; *Detroit City R. Co. v. Mills*, 85 Mich.

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656; *East End St. R. Co. v. Doyle*, 9 L. R. A. 100; *Halsey v. Rapid Transit St. R. Co.* 47 N. J. Eq. 380; *Chicago, B. & Q. R. Co. v. West Chicago St. R. Co.* 156 Ill. 268; *State ex rel. Roebling v. Trenton P. R. Co.* 33 L. R. A. 129; *Montgomery v. S. A. & W. R. Co.* 104 Cal. 186; *S. C.* 25 L. R. A. 654; *Nichols v. Ann Arbor & Y. St. R. Co.* 16 L. R. A. 371. The convenience of abutting owners may, to a reasonable extent, be encroached upon without impairing their constitutional rights or entitling them to compensation. *Cushing v. Boston*, 122 Mass. 173; *Att'y Gen. v. Metropolitan R. Co.* 125 id. 517. The right of a street railway to be considered a part of the general public easement, and its right to cross the tracks of steam railways, have been fully recognized by the courts. *Chicago & C. T. R. Co. v. Whiting, H. & E. C. St. R. Co.* 139 Ind. 297; *S. C.* 26 L. R. A. 337; *Pittsburgh, C., C. & St. L. R. Co. v. West Chicago St. R. Co.* 156 Ill. 385; *New York, N. H. & H. R. Co. v. Bridgeport Traction Co.* 29 L. R. A. 367; *Old Colony R. Co. v. Rockland & A. St. R. Co.* 161 Mass. 416.

CASSODAY, C. J. Milwaukee avenue, at South Milwaukee, runs east and west, and the plaintiff's railroad tracks cross it nearly at right angles. Its depot grounds at that place extend east from such tracks along the south side of the avenue, and abutting thereon, for a distance of 200 feet. On the north side of the avenue, and abutting thereon, and immediately east of said tracks, the plaintiff owns a strip of land or right of way fifty feet in width. The answer expressly admits "that the plaintiff is the owner of the lands" so described, "within said public street, and to the center line thereof," on both sides, "subject to the easement vested in the public." This admission is in accordance with the well-settled rule of law in this state to the effect that the owner of land abutting upon a public street or highway has the legal title to the center of such street or highway, sub-

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ject only to the public easement. *Milwaukee v. M. & B. R. Co.* 7 Wis. 85; *Mariner v. Schulte*, 13 Wis. 692. Upon this principle it has been held by this court that the abutting owner has such rights of property in the soil within the limits of a street or highway that he may remove portions thereof, and construct vaults or other areas under the sidewalk, with openings in the walk, and construct projecting bay windows, *provided* he does so in a manner not to interfere with or endanger public travel. *Papworth v. Milwaukee*, 64 Wis. 389; *Hay v. Weber*, 79 Wis. 590. The general rule is that, *subject to such public easement*, the abutting owner has all the rights and remedies of an absolute owner in fee. 3 Elliott, Railroads, § 1085.

Such being the facts and the law in this case, it is obvious that the adjudication of cases arising in certain states and cities where the title to the land within the limits of public streets and highways is vested in the state or the public can have no bearing upon the question here involved, since the title to the land of such abutting owner in such states and cities terminates at the outer lines of the street or highway; and hence such abutting owner in such states and cities can only have, in addition to such public easement, a right of ingress and egress to and from his premises, or, as it is sometimes called, "an easement of access" to and from his premises. *Id.* The question presented, therefore, is whether the construction of the defendant's track and operating its street railway, as proposed, across the plaintiff's tracks, and upon and over the plaintiff's lands so within Milwaukee avenue, would be merely an exercise of the public easement previously acquired by the construction of that avenue, or an additional servitude and burden, for which the plaintiff, as such abutting owner, is entitled to compensation. In *Ford v. C. & N. W. R. Co.* 14 Wis. 609, 616; *S. C.* 80 Am. Dec. 791, DIXON, C. J., speaking for the court, and following New York and Massachusetts cases, among other things, in

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effect, said: "It is too well settled to allow it now to be drawn in dispute before this court that the proprietors of lots bounded by a public street within a recorded town plat or village take to the center of the street, and own the soil, subject to the public easement." The conclusion is, therefore, "That a railroad company cannot appropriate and occupy it with the track of its road without the consent of such proprietor, or without compensation made to him, and that neither the legislature nor municipal authorities have any power to dispense with such compensation, seems irresistible. . . . The reason is stated in few words by Chief Justice SHAW: 'The two uses are almost, if not wholly, inconsistent with each other; so that taking the highway for a railroad will nearly supersede the former use to which it had been legally appropriated.' The dedication to the public as a highway enhances the value of the lot, and renders it more convenient and useful to the owner. The use by the railroad company diminishes its value, and renders it inconvenient and comparatively useless. It would be a most unjust and oppressive rule which would deny the owner compensation under such circumstances." Accordingly the court affirmed the judgment granting a perpetual injunction. To the same effect: *Hegar v. C. & N. W. R. Co.* 26 Wis. 624; *Pettibone v. Hamilton*, 40 Wis. 411; *Kneeland v. Van Valkenburgh*, 46 Wis. 434; *Burbach v. Schweinler*, 56 Wis. 391; *Norcross v. Griffiths*, 65 Wis. 607, 611. Since such abutting owners have the legal title to the lands in the street, subject only to the public easement, it follows that, whenever such street is abandoned or vacated, such easement becomes extinguished, and such abutting owners, respectively, thereby acquire the right to possession as reversioners. *Burbach v. Schweinler, supra; Racine v. Crotsenberg*, 61 Wis. 485. "It is well settled in this state that the appropriation of a public highway for the purposes of a railroad is the imposition of an additional burden upon the abutting

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owners, and hence is the taking of private property for public use, within the meaning of sec. 13, art. I, Const." *Buchner v. C., M. & N. W. R. Co.* 60 Wis. 272.

Such are the settled rules of law applicable to ordinary steam railways constructed, maintained, and operated in public streets for the carriage of passengers and freight. The question recurs whether the proposed street railway comes within the principles of law thus stated, or whether it will be a mere exercise of the easement acquired by the public when Milwaukee avenue was first opened to public use. In *Hobart v. Milwaukee City R. Co.* 27 Wis. 194; *S. C.* 9 Am. Rep. 461, it was held that "The construction and operation of a horse railway in the public streets of a city, by authority from the city government, is not a new burden imposed upon the owners of the fee of the land, and they are not entitled to a compensation therefor, except where some private right of such an owner (as his free access to his own land or buildings) has been materially impaired thereby." The learned chief justice, who wrote the opinion of the court in that case, after showing that different courts and different judges of the same court have disagreed as to whether the establishment and running of a *horse* railroad in a public street was an imposition of an additional burden upon the land of the abutting owners, reaches the conclusion "that the laying down of the rails and running of the cars in the manner shown by this case is not the appropriation of the street to a new use, requiring compensation to be made therefor to the plaintiff, unless he has shown that he will suffer some private or peculiar injury by being deprived of that free access to his premises which otherwise he would continue to have and enjoy." In that case the vehicles were drawn by horses, the same as ordinary carriages,—the only difference being in the size and shape of the vehicles, and the fact that in the one case they were confined to the fixed

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iron track at grade, while in the other they were not; and yet, even in that case the conclusion of the court mentioned was manifestly so reached with some hesitation. The defendant in that case was incorporated under a special charter, and the law in force at the time authorized the municipality to grant to such corporation "such use . . . of any streets within its limits for the purpose of laying single or double tracks and running cars thereon for the carriage of *passengers only*, to be propelled *by animals or such other power as shall be agreed on.*" Secs. 1, 3, 4, ch. 313, Laws of 1860; sec. 1862, R. S. The same act authorized such corporation to extend its railways to any points within any town *adjoining* such municipality, and to lay and operate its railway upon the highways therein so as not to obstruct public travel thereon, upon procuring the written consent of a majority of the supervisors of such town. R. S. sec. 1863. In 1880 the powers of such street-railway corporations were enlarged and extended so as to authorize the same to build and operate their railways "in any village *or town*, or to extend from any point *in one village or town to, into, or through any other village or town;* and for running of cars propelled by *animals*, for the carriage of either *passengers or freight;* . . . but not so as to obstruct the common public travel thereon." Ch. 221, Laws of 1880; sec. 1863, S. & B. Ann. Stats. In 1881 the powers of such street-railway corporations were further enlarged and extended so as to authorize the same to run "cars thereon for the carriage of *freight and passengers*, to be propelled by *animals* or such other power as shall be agreed on." Laws of 1881, ch. 219; S. & B. Ann. Stats. sec. 1862. In 1891 the act of 1880 (sec. 1863, S. & B. Ann. Stats.) was amended; and the powers of such corporations further enlarged and extended so that such railways should not be limited to "streets," and so that cars might be propelled thereon by "other power" as well as "by animals," "for

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the carriage of either passengers or freight." Laws of 1891, ch. 387.

As indicated in the statement made, the part of the defendant's proposed railway in question is to be a part of its connecting line of railway from the city of Kenosha to the city of Milwaukee; and, as expressed in the defendant's charter, it intends to use said railway, when constructed, for the carriage and transportation of passengers, merchandise, personal baggage, mail, and express matter, in cars and trains propelled by locomotive engines and electricity and other power; but with no provision for condemning lands or acquiring the right of way, nor for joining and uniting with other railways in forming crossings, intersections, and connections, nor in adjusting differences in case of disagreement, as required by statute in the case of steam railways. S. & B. Ann. Stats. sec. 1828, subd. 6. Such a railway is not a street railway, within the ruling of the *Hobart Case*, nor as generally understood. Upon what principle of law can it be said that before the plaintiff can construct its railway across or upon a public street or highway at grade it must make compensation to, or acquire the consent of, the abutting landowner, and yet that the defendant can do the same thing without such compensation or consent? The mere difference in motive power would seem to be insufficient. Besides, there is certainly far more difference in the use of mere horse power, as in *Hobart v. Milwaukee City R. Co.*, *supra*, and electric power, as in the case of the defendant, than there is in the case of electricity and steam. A mere street railway for carrying "*passengers only*," as the statute prescribed under which the *Hobart Case* was decided, would greatly relieve the streets of a city or village from travel, and hence would, to that extent, facilitate travel on foot or by carriage. Such street railways, under the decision in that case, do not necessarily constitute an additional

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servitude or burden for which the abutting owners are entitled to compensation. The same would, to some extent, be true as to the suburbs of cities and villages. But the principle has no application to the country towns between Kenosha and Milwaukee. The carriage of "passengers only" probably included such articles and effects as the passengers retained in their own personal custody. But the several amendments of the Revised Statutes, mentioned, purposely dropped out the word "only," and added the word "freight," and also added the words "other power," as well as horse power. In other words, the manifest purpose of the amendments was to authorize the construction and operation of commercial railways upon such streets and highways without consent of, or compensation to, abutting owners. The charter of the defendant company contemplates the construction and operation of such commercial railway between Milwaukee and Kenosha,— which, of course, on the same theory, might be extended to Chicago. That such commercial railway upon public streets and highways, engaged in the carriage and transportation of merchandise, personal baggage, mail, and express matter, as well as passengers, would tend to obstruct and interfere with the ordinary uses of a street or highway, would seem to be quite manifest. Such use of streets and highways by such commercial railways constitutes, in our judgment, an additional servitude or burden upon the lands of abutting owners for which they are entitled to compensation. This certainly is in harmony with the decisions of this court. While there is much contrariety of opinion on the subject, yet the better rule seems to be that a commercial railroad constitutes an additional servitude or burden for which abutting owners are entitled to compensation. 3 Elliott, Railroads, § 1087, and cases there cited; *Shepardson v. M. & B. R. Co.* 6 Wis. 605; *Sherman v. M., L. S. & W. R. Co.* 40 Wis. 645; *Sweet v. Rechel*, 159 U. S. 380; *Lahr*

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v. Metropolitan Elevated R. Co. 104 N. Y. 268; *Willamette Iron Works v. Oregon R. & N. Co.* 26 Oreg. 224; *S. C.* 29 L. R. A. 88; *State v. C., M. & St. P. R. Co.* 36 Minn. 402.

By the Court.— The order of the circuit court is reversed, and the cause is remanded with direction to grant the temporary injunction, and for further proceedings according to law.

WERTHEIMER, Appellant, vs. SAUNDERS and others, Respondents.

March 16 — April 7, 1897.

Landlord's liability to tenant: Negligence of independent contractors.

1. A landlord who, though not required by the lease to make repairs, undertakes at the request of his tenant to put a new roof upon the leased building, is bound to use reasonable care and skill to prevent injury by the elements to the property of his tenant therein while engaged in removing the old and putting on the new roof, and is liable for any such injury caused by the want of such care and skill, notwithstanding his undertaking was without consideration.
2. In such a case, where injury occurs to the tenant's property in the building from rain through the uncovered roof, the landlord cannot escape liability therefor on the ground that it resulted from the failure of the persons who had undertaken the job, as independent contractors, to exercise reasonable care to avoid such injury.

APPEAL from a judgment of the circuit court for Rock county: JOHN R. BENNETT, Circuit Judge. *Reversed.*

This was an action against the defendants for carelessly and negligently removing a portion of the roof of a certain building in Edgerton, Wisconsin, known as the Edgerton Tobacco Factory, leased by them to the plaintiff, whereby a large quantity of leaf tobacco owned by the plaintiff was exposed to the elements, and was greatly damaged by being

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wet in a rain storm, rendering it necessary to re-handle and re-sort the tobacco, and purchase new cases for it; and other special damages were claimed by reason of the premises.

The defendants admitted the leasing and occupancy of the tobacco factory in question by the plaintiff for the purpose of storing and sorting leaf tobacco, and that, while a portion of the roof was off the building, a rain storm came up, and rained in upon the tobacco, wetting a portion of it to some degree, and doing slight damage thereto. They insisted that by the terms of the lease they were under no obligation to in anywise repair the building; that prior to the time of said injury the plaintiff, through his agent, who had charge of his business in Wisconsin and of the building in question, "repeatedly requested the defendants to repair and fix the roof of said building;" that by reason of said request, and not otherwise, defendants contracted with Messrs. Lindley & Morrissey, a firm of tinners engaged in making the roofing of buildings and competent for that purpose, to put a new tin roof thereon, by the job, at the rate of $9 per square of ten feet, and that they had no control over, and gave no directions of, the time or method of doing such work, except that the tinners agreed to observe proper care and caution in doing the same; that the defendants notified the plaintiff, through his said agent, of the making of said contract, and they entered upon the performance of the work by and with the plaintiff's consent; and that any and all injury done to the plaintiff's tobacco was the result of accidental or sudden rain coming up while said contractors were engaged in roofing the building, and without any negligence or unlawful acts on the part of the defendants, their servants or agents.

At the trial before the court and a jury, it appeared in evidence that the plaintiff had, at the time of the injury, about 800 cases of tobacco in the warehouse, worth about $25,000, 101 of which were more or less damaged by rea-

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son of having been wet by water coming upon the same where the roof had been taken off; that 100 cases were re-handled, re-sorted, and re-packed, and the testimony tended to show items of damage approximating in all to the amount of $2,000; that the plaintiff left Frank Ayers in charge of the tobacco when he returned to New York, where he resided.

It appeared that Ayers, while having charge of the tobacco and looking after plaintiff's business in relation thereto, had repeatedly complained of the insufficiency of the roof, and that it leaked, and that the defendants would have a suit for damages in consequence; that the defendant *Clark*, who, it appears, had principal charge of the building on behalf of the defendants, told Ayers that they were making preparations to put on a new roof; that they were going to put on a new tin roof. Accordingly, on or about the middle of March, they employed the firm of Lindley & Morrissey to put on a tin roof for a specified price. They commenced to put tin on the roof on the 29th of April, obtaining a key to the building from Ayers for the purpose. On that day they put on five sections of tin eighteen and three-fourths inches wide and thirty feet long. On the following day the roof had been taken off of about 700 square feet, sufficient to furnish work for all the day; and there was testimony tending to show that in the morning and forenoon of that day the weather was threatening; that it began to rain between 12 and 1 o'clock, but that at 11 o'clock it looked like rain; that the rain continued during the remainder of Saturday, until 3 o'clock Sunday morning, and rained again Sunday night, and it continued raining more or less until the following Monday morning,—in all to the depth of about three inches. There was evidence tending to show that about 9 o'clock in the morning of Saturday the weather was threatening and had the appearance of rain, and that it did rain in the forenoon.

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The defendant *Clark* testified to the efforts made on his part and others to protect the plaintiff's tobacco from rain, and that they would not have put on this roof except for the request of Mr. Ayers; that Ayers told him that they had got to fix the roof, and that he told Ayers that he would see defendants *Marsden*, *Pierce*, and *Saunders*, and see what they should do,— what kind of a roof they should put on; that he subsequently, before the roof was commenced, told him they were going to put on a new tin roof; that they had seen the tinners, and had made a contract; that this was three weeks before the roof was commenced. It appeared that the defendants knew there was a great quantity of tobacco in the building. The defendant *Saunders* also testified to some of the complaints made to him by Ayers, and that he referred him to *Clark*, as he was overseeing the building. The defendant *Pierce* testified that he consented to the putting on of this roof, because he understood it was wanted by Mr. Ayers, and otherwise would not have consented. There was evidence showing the agency of Ayers to make the request in respect to the roof, and that the contractors for putting on the roof, Lindley & Morrissey, were competent and experienced men for that purpose. The defendants were all the time in the occupancy and use of a small portion of the building, which they had reserved by the lease.

At the close of the testimony the court directed a verdict in favor of the defendants, on the ground that the defendants were not liable for the acts or negligence of Lindley & Morrissey, who were independent contractors for putting on the roof, whereupon judgment was given in favor of the defendants, from which the plaintiff appealed.

For the appellant there was a brief by *Fethers, Jeffris, Fifield & Mouat*, and oral argument by *C. L. Fifield*. They argued that the defendants could not absolve themselves from responsibility by letting the job to independent con-

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tractors. *Sulzbacher v. Dickie*, 51 How. Pr. 500, 523; Moak's Underhill, Torts (1881), 276, 277, and cases cited by the court. Rain was to be expected during the progress of the work, and the damage suffered was the natural and probable result of doing the work without preparation for protecting the contents of the building, and consequently the employer is subject to the same liability as the contractors. *Railroad Co. v. Morey*, 47 Ohio St. 207; *Woodman v. Metropolitan R. Co.* 149 Mass. 335; *Carlson v. Stocking*, 91 Wis. 432, 435.

For the respondents there was a brief by *Luse & Wait*, and oral argument by *L. K. Luse*. They contended that where the work to be done involves the duty of ordinary care only, as in this case, the same can be delegated to independent contractors, and the employer will be absolved from liability for any injury occasioned by the negligent mode in which it is done by such contractors. *Hackett v. W. U. Tel. Co.* 80 Wis. 192; *Smith v. Milwaukee Builders' & Traders' Exchange*, 91 id. 360; *Clark v. Fry*, 8 Ohio St. 358; *McCafferty v. S. D. & P. M. R. Co.* 61 N. Y. 198; *Tibbetts v. K. & L. R. Co.* 62 Me. 437; *Herrington v. Lansingburgh*, 110 N. Y. 145; *Blumb v. Kansas City*, 84 Mo. 112; *Gourdier v. Cormack*, 2 E. D. Smith, 254; *Carter v. Berlin Mills Co.* 58 N. H. 52; *Edmundson v. P., M. & Y. R. Co.* 111 Pa. St. 316; *O'Rourke v. Hart*, 7 Bosw. 511.

PINNEY, J. There was no stipulation in the lease from the defendants to the plaintiff requiring them to make repairs upon the building, or to put a new roof thereon; and any promise to do so, founded merely on the relation of the parties, and not one of the conditions of the lease, would be without consideration, and for that reason would create no liability. But it is very well settled that, although a gratuitous contract of that kind would not be binding, the lessors (defendants), having seen fit to treat it as binding, or to repair the roof, or to put a new one on the building, and having

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actually entered upon its fulfillment, either by themselves or contractors under them, they would thereby come under some degree of liability to the plaintiff as to the manner of its performance.

It is well settled that for an injury occasioned by want of due care and skill in doing what one has promised to do an action may be maintained against him in favor of the party relying on such promise, and injured by the breach of it, although there was no consideration for the promise, and it was at the tenant's solicitation. *Gill v. Middleton*, 105 Mass. 477. In *Sulzbacher v. Dickie*, 51 How. Pr. 500, where the authorities were carefully considered, it was held that, where the owner of the building enters into a contract with a builder to put a new roof on it at a stipulated price, and during the time of putting it on, and after the removal of the old one, and while the building was in an exposed condition, the tenant or subtenant is damaged by rain, the owner is answerable for the damage, and not the contractor; that the landlord or owner, in the exercise of the right to put on a new roof, is bound to see that all reasonable care and skill is exercised in the removal of the old one and in the putting on of the new one to prevent injury by the elements to those who are in the occupation of the house; and where the act undertaken, from its very character, is either a nuisance, or one dangerous to others, the one undertaking it is not released from responsibility to any one injured thereby, although he has entered into a contract with some one to perform it, and the injuries occurred through the negligence of the latter. *Lasker Real Estate Asso. v. Hatcher* (Tex. Civ. App.), 28 S. W. Rep. 404; *Glickauf v. Maurer*, 75 Ill. 289.

Had the defendants personally attended to the putting on of the new roof, and been guilty, in doing so, of the negligence charged as the cause of the plaintiff's injury, we think there is no doubt but that they would be liable.

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The evidence shows that the work of putting on the roof, in the present instance, was undertaken in consequence of the solicitation and request of the plaintiff, through his agent, Ayers, and by entering upon the performance of the work, though through the medium of a contract with third parties, the defendants assumed and owed the plaintiff a particular duty in the premises, namely, that reasonable care and caution should be used in conducting the work of taking off the old roof and putting on the new one, to avoid doing any injury to the property of the plaintiff. This was an absolute duty imposed by law, upon the particular facts, and was just as binding as if the defendants had stipulated in the lease for its performance. The work to be done was one attended with risk and danger to the property of the tenant by reason of its exposure to the elements. That one upon whom the law devolves a duty cannot shift it over upon another, so as to exonerate himself from the consequences of its nonperformance, is very clear. Shearm. & Redf. Neg. §§ 174–176; Wood, Master & S. § 316; Whart. Neg. § 185; *Promer v. M., L. S. & W. R. Co.* 90 Wis. 220–223; *Cadden v. Am. Steel Barge Co.* 88 Wis. 418, 419. In *Railroad Co. v. Morey*, 47 Ohio St. 207, 214, the court held it "clear that the law devolves upon every one about to cause something to be done which will probably be injurious to third persons the duty of providing that reasonable care shall be taken to obviate those probable consequences." And in *Hughes v. Railway Co.* 39 Ohio St. 476, it was stated that "The employer cannot relieve himself from liability by contracting with others for the performance of work, when the necessary or probable effect of the performance of the work would injure third persons."

The contention is that the defendants have discharged themselves from liability by turning the work over to third parties, independent contractors, for whose negligence in its performance they are not responsible. An examination of

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adjudicated cases shows that there are exceptions to the general doctrine relied on by the defendants, and many such cases are cited, and the grounds of exception to the general rule are stated in the note to *Hawver v. Whalen*, 14 L. R. A. 828, as where a city is charged with the duty of keeping its streets in repair it is answerable for an improperly guarded excavation made by a contractor in building a sewer or the like. *Storrs v. Utica*, 17 N. Y. 104; *Robbins v. Chicago*, 4 Wall. 657–679; *Water Co. v. Ware*, 16 Wall. 567–576. If an injury might be anticipated as a direct or probable consequence of the performance of work contracted for, unless reasonable care be used, the negligence of the contractor or his employees will be chargeable to the person for whom the work is done, and the latter will be held liable accordingly. *Woodman v. Metropolitan R. Co.* 149 Mass. 335–339. In such case one cannot, by employing an independent contractor, relieve himself from liability for a failure to exercise reasonable care to discharge a duty incumbent upon himself, but he is bound to see to it that such care is used, although such contractor stipulates with him to take the risk and responsibility. So, in the present case, the defendants cannot claim immunity from liability by reason of having delegated or turned over to independent contractors for the work the performance of the duty they themselves owed to the plaintiff. Ever since the case of *Quarman v. Burnett*, 6 Mees. & W. 499, it has been considered that a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching to him of seeing that duty performed, by delegating it to a contractor. He cannot thereby relieve himself from liability to those injured by the failure of the contractor to perform it. In *Bower v. Peate*, 1 Q. B. Div. 321–326, it was laid down that "A man who orders work to be executed, from which, in the natural course of things, injurious consequences must be expected to arise un-

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less means are adopted by which they may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else — whether it be the contractor employed to do the work from which the danger arises, or some independent person — to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. There is an obvious difference between committing work to a contractor to be executed, from which, if properly done, no injurious consequences can arise, and handing over to him work to be done, from which mischievous consequences will arise, unless preventive measures are adopted. While it may be just to hold the party authorizing the work, in the former case, exempt from liability for injury resulting from negligence which he had no reason to anticipate, there is, on the other hand, good ground for holding him liable for an injury caused by an act certain to be attended with injurious consequences, if such consequences are not in fact prevented, no matter through whose fault the omission to take the necessary measures for prevention may arise." Here the removal of the roof was by the direction and authority of the defendants, and at the request of the plaintiff, and the injury resulted from what the defendants procured their contractors, under them, to do, and the alleged negligent manner of their doing it. It is manifest that the removal of the old roof, in order to put on a new one, necessarily exposed the property of the tenant, the plaintiff, to injury from the elements; and the duty, as already stated, was cast on the defendants to see that reasonable care was taken to avert such result. The argument of counsel for the defendants wholly ignores the existence of such duty on the part of the defendants, and its bearing, and erroneously assumes, as we think, that the action is to charge the defendants solely on the ground of the collateral negligence of the contractors. The doctrine of *Bower v. Peate*, *supra*, was ap-

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proved in *Dalton v. Angus*, 6 App. Cas. 829, and Lord WATSON stated the rule to be that "When an employer contracts for the performance of work which, properly conducted, can occasion no risk to his neighbor's house, which he is under obligation to support, he is not liable for damages arising from the negligence of the contractor. But in cases where the work is *necessarily attended with risk* he cannot free himself from the liability by binding the contractor to take effectual precautions. He is bound, as in a question with the party injured, to see that the contract is performed; and is, therefore, liable, as well as the contractor, to repair any damage which may be done." In *Pickard v. Smith*, 10 C. B. (N. S.), 470, the precise point in this case was stated and considered, and it was said that "If an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable. That rule is, however, inapplicable to cases in which . . . the contractor is intrusted with the performance of a duty incumbent upon his employer, and neglects its fulfillment, whereby an injury is occasioned." And this is the case now before us. The case of *Gray v. Pullen*, 5 Best & S. 970, is to the same effect, and is an authority, as stated in *Bower v. Peate*, that "it can make no difference, in point of principle, whether the obligation was imposed by statute or existed at law; and that, where work is being executed from which danger may arise to others, and it thereby becomes incumbent on the party doing or ordering it to be done to take measures to prevent damage resulting to others, he cannot divest himself of liability by transferring the duty to a contractor." 1 Q. B. Div. 327, 328. And this is in accord with *Storrs v. Utica*, 17 N. Y. 104; *Robbins v. Chicago*, 4 Wall. 657-679, and *Chicago City v. Robbins*, 2 Black, 418.

Inasmuch, therefore, as the defendants, as landlords, owed

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the plaintiff, their tenant, a special duty, growing out of their relations as such, to use reasonable care to protect the plaintiff's property in the building from injury by the elements while repairing the roof or putting on a new one, as they had undertaken or assumed to do at his request, they became liable for the performance of such work in an insufficient or negligent manner, although the work was so performed for them by independent contractors. None of the cases cited by the defendants' counsel appear to have been cases where the landlord, or person contracting for doing the work, owed a special duty to the party injured that it should be done with reasonable care to avoid such injury. We think, therefore, for the reasons stated, that the present case falls within a well-recognized exception to the rule invoked on behalf of the defendants. There was sufficient evidence of negligence in the performance of the work causing the injury to require the case to be submitted to the jury. The direction of a verdict for the defendants, therefore, was erroneous.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded for a new trial.

STRIKE, Respondent, vs. WISCONSIN ODD FELLOWS MUTUAL LIFE INSURANCE COMPANY and others, Appellants.

March 16 — April 7, 1897.

Mutual life insurance: Assignment of certificate.

1. One who effects an insurance on his own life in a mutual life insurance company organized under ch. 1, Laws of 1887, may, under the provisions of sec. 14 of that chapter, assign his certificate to any person other than the beneficiary named therein, without any reference to such beneficiary, whether his assignee has any insurable interest in his life or not.

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2. This right of a person who insures his own life to assign the certificate is not affected by sec. 2347, R. S., as amended by ch. 376, Laws of 1891, authorizing any person to insure his life for the benefit of a married woman, and making such insurance her sole and separate property, free from the control of her husband and from the claims of his creditors.
3. The restriction of such assignments to persons having an insurable interest, by ch. 20, Laws of 1895, cannot apply to insurances previously assigned.

APPEAL from a judgment of the circuit court for Jefferson county: JOHN R. BENNETT, Circuit Judge. *Affirmed.*

The defendant is a mutual life insurance company, organized by ch. 1, Laws of 1887. On June 23, 1892, it issued to one Francis J. Cory a certificate of membership, whereby it agreed to pay $1,000 to his parents, *Sampson Cory* and *Ann Cory*, within ninety days after proofs of his death should be received by its secretary. The membership fee and all assessments were paid by Francis J. Cory, except one assessment of $1.20, which was paid by *Sampson Cory*. The circumstances and reason of this payment by *Sampson Cory* are unexplained. In February, 1893, Francis assigned his certificate of membership to the plaintiff, and duly executed and filed with the secretary of the company a written instrument directing the sum named in the certificate to be paid to the plaintiff, and requesting the company to "send all assessment notices" to the plaintiff. Notices of all subsequent assessments were sent by the company to the plaintiff, and he paid them to the company. The plaintiff paid Francis $50 for the assignment, and subsequently paid the company, for assessments, upwards of $50 more. The plaintiff was in no way related to Francis. On May 12, 1895, Francis died. At the time of his death the certificate of membership in the defendant company was in full force, and no assessment was unpaid. Proofs of the death were duly made, and delivered to the defendant's secretary. The company admitted its liability for the loss, but did not pay it,

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because it was claimed by both the plaintiff and the defendants *Sampson* and *Ann Cory*. At the request of the defendant company, and by stipulation of the parties, *Sampson Cory* and *Ann Cory* were made parties defendant. They claimed the money on the ground that the assignment of the certificate of membership to the plaintiff was unauthorized and void, for the reason that the plaintiff had no insurable interest in the life of Francis. There was no controversy about the facts. The trial was by the court, without a jury. There was judgment for the plaintiff for the whole amount of the certificate, from which all the defendants appeal.

For the appellants there was a brief by *L. H. Mead* and *Charles E. Estabrook*, and oral argument by *Mr. Estabrook*. They argued, *inter alia*, that one of the beneficiaries named in the certificate paid a part of the consideration, and had a vested interest which could not be disposed of without his consent. The assignment was, in terms, of money to accrue to the estate of the assured, and was inoperative because there was none coming to his estate. The plaintiff had no insurable interest in the life of the assured and could not hold the insurance by assignment. *Conn. Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457, 461; *Warnock v. Davis*, 104 id. 775, 779; *Crotty v. Union M. L. Ins. Co.* 144 id. 621, 625; *Missouri Valley L. Ins. Co. v. Sturges*, 18 Kan. 93, 26 Am. Rep. 761. One of the original beneficiaries being a married woman, her interest was, under sec. 2347, R. S., as amended by ch. 376, Laws of 1891, not subject to the control of the assured.

L. B. Caswell, for the respondent.

NEWMAN, J. The only question is whether the plaintiff, having no insurable interest in the life of Francis Cory, could take title to the insurance money by the assignment of Francis. The beneficiaries named in the certificate had an insurable interest in the life assured. So there was a

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valid contract of insurance. The assessments were paid by Francis. Only one, for some unexplained reason, was paid by one of the beneficiaries. Francis was the owner of the insurance. Being the owner, he had the right, as against the beneficiaries, to assign the insurance. *Foster v. Gile*, 50 Wis. 603; *Estate of Breitung*, 78 Wis. 33. There was no restriction on the right of assignment in defendant's charter. The right of the member to assign his insurance was express, and without restriction. It was (sec. 14, ch. 1, Laws of 1887): "Any member may file, with the secretary of the company, a written or printed instrument, duly signed in the presence of two witnesses, directing the said amount to be paid to a person named therein, other than the beneficiary named in his or her certificate, in which case the said amount shall be paid, within the time aforesaid, to the person named in such instrument." The same section contains another provision, which authorizes an assignment of the certificate, or any interest therein, by a similar instrument, for the purpose of securing a debt or money advanced to a person other than the beneficiary named in the certificate. This is entirely independent of the general provision cited, and does not control or qualify it. Certainly the charter gives ample authority, if indeed it were needed, for an assignment of the insurance. It does not, in terms, even require the consent of either the beneficiary named in the certificate, or of the company. Nor is the right of assignment, in terms, restricted to such persons as have an insurable interest in the life assured. And no such restriction can be imported into the statute by construction. General words in a statute are to receive a general construction, unless there is something in the statute itself, or in its proper subject matter, to restrain it. Suth. St. Const. § 249; *Chase v. Whiting*, 30 Wis. 544. Such general construction may, however, be restrained by considerations of public policy, growing out of the subject matter of the statute. *Wilkinson v. Hoffman*, 61 Wis. 637;

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Purtell v. Chicago F. & B. Co. 74 Wis. 132; *Chapman Valve Mfg. Co. v. Oconto Water Co.* 89 Wis. 264. But there are no considerations of public policy which restrain the power of assignment given by the general words of the charter, to be enforced by construction. For it has been held by this court that "a policy of life insurance, obtained in good faith by a person having an insurable interest in the life of the assured, may be assigned to *any person*, with the consent of the company." *Bursinger v. Bank of Watertown*, 67 Wis. 75; *Hurd v. Doty*, 86 Wis. 1. Even if the consent of the company were deemed necessary, it could hardly be doubted that giving notice of assessments to the assignee, and receiving payment of assessments from him, without explanation, are equivalent to consent in the first instance.

Sec. 2347, R. S. (ch. 376, Laws of 1891), has no application to this question. Francis Cory effected the insurance upon his own life, and kept it alive by the payment of the assessments. He had full power to dispose of it without reference to the beneficiaries named in the certificate. This is settled by *Foster v. Gile, supra.* This statute was not intended to change that rule. *Kerman v. Howard*, 23 Wis. 108; *Given v. Wis. O. F. M. L. Ins. Co.* 71 Wis. 547. The leading object of the statute was, no doubt, to preserve to a married woman such insurance as should be provided for her benefit, and as her sole and separate property, free from the control of her husband and from the claims of his creditors. It was not intended to take from the party who effected insurance upon his own life at his own cost the right to control and dispose of the policy. Besides, it is evident that this insurance was never provided for the sole and separate property of *Ann Cory.* It was intended that her husband should have some control and property in it. Nor can it be said that the consideration paid for the assignment was inadequate. Francis had apparently many years of life before him, and the prospect of paying many assessments before it should ripen into

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a benefit to his assignee. By ch. 20, Laws of 1895, the right of assignment of such insurance is restricted to such persons as have an insurable interest in the life of the member, and it provides that no money shall be paid to any assignee who has not such insurable interest. It cannot be held that this statute was intended to have a retroactive effect. It would be invalid to affect insurance lawfully assigned before its enactment. Such a statute would impair the obligation of a contract lawful when made, and is beyond the power of the legislature to enact.

By the Court.— The judgment of the circuit court is affirmed.

DEISSNER, Respondent, vs. WAUKESHA COUNTY, Appellant.

March 16 — April 7, 1897.

Sheriffs: Compensation for board of prisoners.

Our statutes relating to the compensation of sheriffs for the maintenance of persons confined in jail (secs. 4947, 4950, R. S.), clearly contemplate that a sheriff shall keep accurate accounts of all charges and expenses therefor and present them to the county board to be audited, and if he fails to do so he can recover from the county only such expenses as he is able to show that he actually incurred, by clear and satisfactory evidence, and only such as are reasonable.

APPEAL from a judgment of the circuit court for Rock county: JOHN R. BENNETT, Circuit Judge. *Reversed.*

The plaintiff was sheriff of *Waukesha* county, Wisconsin, in the years 1893 and 1894. He filed a bill against his county for services and for board and washing furnished prisoners. The charges for board and washing aggregated $6,667.50, and was made on a basis of thirty-five cents per day for each prisoner confined in jail. *This charge* was allowed by the board at twenty-five cents per day, and from

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their action in that regard plaintiff appealed to the circuit court. The venue was changed to the circuit court for Rock county, where the cause was referred to a referee to hear, try, and determine. Such referee found, in substance: (1) That the claim, as presented to the county board, was for 18,776 days' board and washing, at thirty-five cents per day, which was allowed at twenty-five cents per day; hence, that the only question presented by the appeal was whether the expense incurred for board and washing exceeded the amount allowed by the county board. (2) That the number of days counted by the sheriff was made up by reckoning full days from the day of commitment to and including the day of discharge of the prisoners, without regard to the number of meals furnished; hence, it was impossible to tell the actual number of days' board. (3) That no account of expenses was kept, except during three months when the undersheriff was in charge, and that the accounts so kept were not produced on the trial. (4) That the expense which plaintiff actually incurred was approximately established from evidence of the kind, amount, and cost of provisions which each prisoner consumed per day, and the cost of serving the same; also, by evidence of what it cost the undersheriff per day for each prisoner during the time he managed the jail, together with evidence to the effect that the cost of provisions and help continued substantially the same during the whole time; also, evidence by experts respecting the reasonable expense of furnishing board and washing in such cases. That by such testimony it appeared that the expense incurred by plaintiff exceeded thirty-five cents per day for each person. (5) That it is entirely practicable to keep accounts so as to show the cost of keeping all prisoners for any given time, but impracticable to show what it cost for particular prisoners, and that a sheriff's bill must necessarily be made up on a general average. (6) On the findings of fact the referee concluded that plaintiff was entitled to judg-

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ment for the ten cents per day on 18,776 days, disallowed by the board, with interest.

Thereafter the requisite proceedings were had necessary to preserve for review the questions discussed in the opinion. Judgment was rendered for plaintiff in accordance with the report of the referee, and defendant appealed.

T. W. Parkinson, for the appellant.

For the respondent there was a brief by *Ryan & Merton*, and oral argument by *E. Merton*.

MARSHALL, J. In *Doty v. Sauk Co.* 93 Wis. 102, this court held that under secs. 4947, 4950, R. S., a sheriff is entitled to the actual expenses which he incurs in maintaining prisoners, including the cost of materials used for food and of preparing and serving the same, but no allowance for his personal services. It is contended on the part of the defendant that that case rules this. Here, as there, in respect to the expenditures for board of prisoners, the sheriff failed to keep any accounts, and did not pretend to know how much he had expended. At best, on the evidence, the court could only guess at the amount. There was evidence of the cost of provisions; also, evidence of what it cost some other person to do similar work under similar circumstances, all such evidence being of a very loose and unsatisfactory character. For instance, plaintiff's evidence was to the effect that it would take, among other things, about forty gallons of syrup, seven hundred weight of flour, thirty-six pounds of coffee, forty-five pounds of oatmeal, forty-five pounds of sugar, and eighteen pounds of tea to supply one prisoner for a year. Then he testified to the cost per month for servants and for overseeing the work, and the value of his wife's services, and testified that, in counting days, it was without reference to actual days or meals furnished; that the day of commitment and the day of discharge were counted as full days. Such evidence was followed by some opinion evidence re-

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specting what was the reasonable cost of boarding prisoners. In our judgment, such evidence is far from coming up to the rule of *Doty v. Sauk Co.*, and the plain meaning of the statutes. Such statutes [R. S. secs. 4947, 4950] say, "The sheriff shall be paid . . . the accounts having been first allowed by the county board." That clearly contemplates that the sheriff shall keep accounts of all expenses for which the county is liable. Failure in that regard constitutes a clear violation of official duty, and courts cannot properly be called upon to remedy such neglect, for the benefit of the negligent official, but rather should apply stringent rules in determining how much should be paid to an officer under such circumstances. The rule should be as stringent as that applied to the adjustment of the accounts of trustees under similar circumstances. Every intendment of fact should be made against the claim, and the lowest estimate put upon all charges and expenses, and only such allowed as are reasonable and established by clear and satisfactory evidence. If the result of such rule works a loss to the sheriff, it is because of his violation of official duty, for which he alone is responsible and alone should bear the loss. No reason exists why all the items of expense incurred in maintaining prisoners should not be carefully kept, the same as a good business man would keep his business accounts, so that all such expense can be audited with certainty of doing exact justice to the sheriff and the public as well. The statutes contemplate that the accounts will be so kept and so audited.

The principle of this decision is that, under the statutes of this state, the sheriff is entitled to pay for his actual expenses in maintaining prisoners confined in county jails under his charge (following *Bell v. Fond du Lac Co.* 53 Wis. 433; *Nickell v. Waukesha Co.* 62 Wis. 469; *Parsons v. Waukesha Co.* 83 Wis. 288, and *Doty v. Sauk Co.*, *supra*); that the law contemplates that he shall keep accurate accounts

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of all such expenses, and present the same to the county board, and have the same audited, before receiving payment; that, if he neglects so to do, he can recover of the county, in an action therefor, only such expenses as he is able to show he incurred, by clear and satisfactory testimony, and only such as are reasonable.

It follows from the foregoing that the motion made by the defendant's counsel to modify the report of the referee so far as it allowed plaintiff any sum in excess of that allowed by the county board, and for judgment against plaintiff for costs, should have been granted.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded with instructions to enter judgment in defendant's favor in accordance with this opinion.

SOUTH MILWAUKEE BOULEVARD HEIGHTS COMPANY, Appellant, vs. HARTE, Respondent.

March 16— April 7, 1897.

Pleading inconsistent defenses: Instructions.

1. Under sec. 2657, R. S., a defendant may plead as many defenses and counterclaims as he may have, even though they are based upon inconsistent legal theories. With a defense of fraud for which he seeks a rescission of the contract sued on, and a counterclaim for payments made thereon, the defendant may, therefore, join a counterclaim for breaches of such contract, if held binding.
2. A refusal by the court to instruct the jury, as requested, that the defendant could not obtain a rescission of the contract for false representations nor recover on the counterclaim for money paid on such contract, if by the exercise of diligence he might have discovered their falsity, or if he failed to exercise his right to rescind within a reasonable time after the discovery, *held*, not to be error, where the general charge gave that instruction in substance.

APPEAL from a judgment of the circuit court for Jefferson county: JOHN R. BENNETT, Circuit Judge. *Affirmed.*

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This is an action to recover the second instalment upon a land contract. On the 12th day of December, 1892, the plaintiff company entered into a written contract with the defendant to sell him a certain lot of land in the village of South Milwaukee for the sum of $375, to be paid in four equal annual instalments; the first instalment to be paid at the date of the contract, and others annually thereafter, with interest on the deferred payments. The defendant made the first payment of $93.75 at the date of the contract, but refused to make the second payment, which fell due December 12, 1893, and also refused to pay the taxes upon the lot for the year 1893, which by the agreement he was required to pay. Upon this refusal this action was brought to recover such second payment, with the amount of such taxes, with interest. The complaint is in appropriate form for the recovery of said sums. The answer sets up as a defense that the land contract was obtained by false and fraudulent representations to the effect that an adjoining block had been purchased and paid for in full by Frederick Pabst, who had agreed to build certain extensive buildings thereon in the following spring, and, further, that the plaintiff had entered into a bond to the county of Milwaukee to grade, gravel, and sidewalk the street upon which the lot was situated prior to May 1, 1895. The answer further alleged that the defendant had rescinded the contract. The answer also contained two counterclaims: First, a counterclaim to recover $93.75, paid at the date of the contract, with interest, on the ground that the contract was induced by false and fraudulent representations, and had been rescinded; and, second, a counterclaim to recover damages for breach of the contract, by reason of the failure of the plaintiff to grade, gravel, and sidewalk the street. The plaintiff, by his reply, alleged that the defendant, by his second counterclaim, waived any and all rights he may have had to rescind the contract, and that by such second counter-

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claim he had affirmed and ratified said contract. Further replying, the plaintiff admitted that the grading, graveling, and laying of sidewalks upon said street had not been completed, but alleged that the work was progressing, and would be completed as fast as necessity existed.

Upon the trial the plaintiff demurred, *ore tenus*, to the answer and counterclaims, which being overruled, the plaintiff moved to strike out the defense because it was inconsistent with the counterclaims, and further moved that the second counterclaim be stricken out as inconsistent with the first counterclaim, all of which were denied by the court, and exception taken. The plaintiff also objected to the submission of any evidence on the first counterclaim, on the ground that the defendant was estopped by the admission of the second counterclaim, which objection was also overruled. The trial resulted in a verdict for the defendant, assessing his damages on the first counterclaim at $134.35, being the amount of the first payment with interest thereon from the time of the alleged rescission of the contract. From the judgment upon the verdict the plaintiff appealed.

For the appellant there was a brief by *Elliott & Hickox*, and oral argument by *E. S. Elliott*. To the point that the answer set up inconsistent claims which it was not the design of sec. 2657, R. S., to allow, they cited *Hartwell v. Page*, 14 Wis. 49; *Rheinhart v. Whitehead*, 64 id. 47; *Hooker v. Greene*, 50 id. 271; 1 Ency. of Pl. & Pr. 856; *Burnham v. Call*, 2 Utah, 433; *Brown v. Bowen*, 90 Mo. 190; *McClanahan v. West*, id. 322; *Steenerson v. Waterbury*, 52 Minn. 211; *Blodgett v. McMurtry*, 39 Neb. 210; *Pavey v. Pavey*, 30 Ohio St. 600.

Geo. W. Bird and *H. T. Ames*, for the respondent.

Winslow, J. 1. The appellant's first contention is that the second counterclaim is inconsistent with the defense and with the first counterclaim, and that the demurrers to the

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defense and the first counterclaim should have been sustained, and no evidence received under them, on account of such inconsistency. This contention must fail. It is well settled that the defendant may plead as many defenses and counterclaims as he has, although they may be based on inconsistent legal theories. R. S. sec. 2657; *Bruce v. Burr*, 67 N. Y. 237; Pomeroy, Code Rem. (3d ed.), § 722, and authorities cited in note; Maxwell, Code Pl. 396, 397. This rule does not invade the general principle that the truth should be pleaded, nor the principle that an admission in an answer will not be affected by a repugnant denial in another part of the same answer. *Hartwell v. Page*, 14 Wis. 49. While authorities may be found stating, in general terms, that inconsistent defenses cannot be set up in the same answer, examination will show that these are generally cases where repugnant allegations of fact are contained in the different defenses, and where, consequently, the proof of one defense would necessarily disprove the other. There are in the present case no repugnant nor contradictory statements of fact. Indeed, the facts alleged in the defense and in the counterclaims are perfectly consistent and harmonious. The only object of the second counterclaim is to obtain damages for breach of the contract, should it be held that it was binding, and that there was no fraud. This, we hold, may properly be joined with a defense or counterclaim to avoid the contract on the ground of fraud.

2. The following instructions were requested by the plaintiff, and refused: "The defendant cannot, under the evidence, recover upon his first counterclaim, nor obtain a rescission on the grounds of false representations, if, by the exercise of diligence at the time and place said representations were made, he might have discovered that they were incorrect, unless prevented from the discovery of the truth by the artifice of the plaintiff. The defendant cannot recover if he failed to exercise his right to rescind within a reasonable

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time after the discovery of the alleged defect." The court, however, in the general charge, instructed the jury as follows upon these subjects: "I will instruct you, gentlemen, generally, that a party must always exercise due diligence to protect himself from fraud, and by due diligence is meant such diligence as ordinarily prudent men would use; and he must also continue to use due diligence to protect his rights all through, and, if due diligence requires that he should make an effort to find out whether he is defrauded, he must use that diligence; and whether he did is a question of fact for you. It does not necessarily follow, because Capt. Pabst did not erect the buildings, or start to, in the spring of 1893, that the defendant was bound to know that he had not bought the lots, or bound himself to erect them. But you may take that into account, as a circumstance tending to open the eyes of the defendant and cause him to make inquiry as to whether Capt. Pabst had made the purchase. And a man must exercise ordinary diligence to protect himself from fraud in making contracts, and by ordinary diligence is meant such care and diligence as the great majority of mankind, or ordinarily prudent men, would exercise under like circumstances. And whether such ordinary care and diligence were in fact exercised is a question of fact for the jury, under all circumstances disclosed by the evidence in the case. So a party desiring to rescind a contract which he has been induced to enter into by fraud must, within a reasonable time after discovering the fraud, so signify to the other party, and this he may do by an ordinary notice. And what is a reasonable time is a question of fact for the jury, to be determined by the evidence in the case, and all the attending circumstances disclosed by the evidence." Conceding that the instructions asked were correct in law, we think the substance of them was fairly covered in the general charge.

3. A number of exceptions were taken to the rulings on

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evidence. It does not seem necessary to state the points made. We have examined the rulings, and find no error.

By the Court.— Judgment affirmed.

BURSINGER, Respondent, vs. A. FUERMANN BREWING COMPANY, Appellant.

March 17—April 7, 1897.

Appeal: Verdict sustained by evidence.

Upon appeal in a case involving only questions of fact, where the verdict was fairly sustained by the evidence, the judgment was affirmed.

APPEAL from a judgment of the circuit court for Jefferson county: JOHN R. BENNETT, Circuit Judge. *Affirmed.*

The action is upon a promissory note executed by the defendant to A. Fuermann, Sr., for $10,806.88, and by the payee made a gift to the plaintiff, who was his daughter. The defense was want of consideration. The payee of the note was a wealthy brewer. He put his brewing property into a corporation,— the defendant brewing company. He gave stock to two of his sons, retaining the major part himself. The three constituted the stockholders and officers of the corporation. The sons became largely indebted to the corporation. The father paid the debts to the corporation, and took an assignment of their stock from the sons. On a settlement of their affairs, there was found to be due to the father the sum named in the note for unpaid salary as president of the corporation and dividends made at the time, and the note was given, on that consideration, as a settlement and compromise. For the defense it was claimed that the corporation was insolvent, and had no right to prefer its stockholders and officers; that the capital of the corpo-

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ration was a trust fund for creditors, and the note fraudulent as to them; that, although the books showed a surplus, that was apparent only, not real, and the product of the bookkeeping only, and that the salary had been once paid. There was a special verdict, whereby all the issues were found for the plaintiff, and judgment was entered thereon, from which the defendant appeals.

Harlow Pease, for the appellant.

For the respondent there was a brief by *Geo. Grimm*, attorney, and *L. B. Caswell* and *W. H. Rogers*, of counsel, and oral argument by *Mr. Caswell* and *Mr. Rogers*.

NEWMAN, J. The case involves only questions of fact. The verdict is fairly supported by the evidence. There were no serious errors of practice in the trial. The books of the defendant showed credits to A. Fuermann, Sr., for salary to a larger amount than the note. They also showed a surplus of earnings. This tends, at least, to show a sufficient consideration for the note. But it is said that such surplus was only apparent, not real, and that the corporation owed a large indebtedness and was really insolvent; but the evidence really tends to show that the corporation, if insolvent at all, was only theoretically so. It was and has been a steadily going concern, and has never become practically insolvent. It is not needful to scrutinize too closely. No rights of creditors are involved or affected by the litigation. No one of the stockholders was ignorant of the situation, or made the settlement under the influence of misconception or deception. They were all adult men, and had the right to do as they would with their own. There really seems to be no reason why the settlement should not be carried out. Really, A. Fuermann, Sr., was the *A. Fuermann Brewing Company*. He furnished all the property which it owned. He used it as a means for the advancement of his children. He gave stock to his sons. He desired his daughter, the

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plaintiff, to have from his property the amount of this note. No one was deceived or will be injured if his purpose in that regard be carried out.

By the Court.— The judgment of the circuit court is affirmed.

BADGER, Appellant, vs. JANESVILLE COTTON MILLS, Respondent.

March 17 — April 7, 1897.

Nonsuit: Master and servant: Negligence.

1. The same rule applies to a motion for a nonsuit made at the close of all the evidence as to one moved for at the close of plaintiff's evidence,— that it should not be granted when the evidence on the part of the plaintiff alone, under the most favorable construction it would reasonably bear, would support a verdict in his favor.
2. Where, in an action against an employer for an injury to an employee, alleged to have been caused by the negligence of the defendant in furnishing to the plaintiff a defective ladder to use in the discharge of his duties, there was testimony on the part of the defense to show that the ladder was apparently sound, and had shortly before the accident safely carried the weight of two men, and in the opinion of an expert would carry 900 pounds of steady weight, *held*, that the reasonable probability was that the ladder broke from some cause other than plaintiff's weight, as testified to by him, and a nonsuit was properly granted.

APPEAL from a judgment of the circuit court for Rock county: JOHN R. BENNETT, Circuit Judge. *Affirmed.*

This is an action for damages alleged to have been caused by actionable negligence on the part of the defendant, in that it failed to furnish plaintiff, one of its employees, suitable appliances with which to do his work. The allegations of the complaint are to the effect that plaintiff, on the 12th day of November, 1894, was in the employ of the defendant in a cotton mill operated by such defendant in the city

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of Janesville, Wisconsin; that his duty was to repair and keep in order, among other things, the belts running to and operating the looms; that such belts ran from driving pulleys on shafts suspended on hangers from ten to twelve feet above the floor; that, in the performance of his duty, it became necessary from time to time for him to reach the shafts and pulleys by means of a ladder which defendant furnished for that purpose; that such ladder was unsafe, defective, and unsuitable for such use, so as to be liable to break from the weight of a person upon it; that on the day named, while in the performance of his duty, with due care, plaintiff ascended the ladder, to remove a belt which had become misplaced and wound up around the shaft, and that while so doing, by reason of the defective condition of the ladder, it broke, letting the plaintiff fall against the shaft and a pulley thereon, whereby his arm was caught in the shaft and pulley, and broken, torn, and mangled so that it became necessary to amputate the same at the shoulder. Damages were claimed in the sum of $20,000. Defendant answered, denying that the ladder was unsafe or unsuitable for the use of plaintiff in the performance of his work, and alleging that it was in every way safe and suitable for such purpose, and that plaintiff's injury was caused by his own negligence.

At the close of plaintiff's evidence, defendant's counsel moved the court for a nonsuit, which motion was denied. At the close of all the evidence, defendant's counsel moved the court to direct a verdict in defendant's favor, and thereupon the motion for the nonsuit previously made was granted, and plaintiff's counsel excepted thereto. Judgment was thereafter entered, dismissing the complaint, with costs, from which judgment this appeal was taken.

For the appellant there was a brief by *Fethers, Jeffris, Fifield & Mouat*, and oral argument by *O. H. Fethers* and *C. L. Fifield*. To the point that the nonsuit was improper,

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because against positive evidence, and based upon that which was incompetent, they cited *Griffin v. Willow*, 43 Wis. 509, 512; *Oleson v. Tolford*, 37 Wis. 327, 330; *Kelly v. Fond du Lac*, 31 Wis. 179, 185; *Hoye v. C. & N. W. R. Co.* 62 Wis. 666, 671; *O'Brien v. C. & N. W. R. Co.* 92 Wis. 340, 343; *Leiser v. Kieckhefer*, *ante*, p. 4.

For the respondent there was a brief by *Sutherland & Nolan*, and oral argument by *G. G. Sutherland.*

MARSHALL, J. Notwithstanding the nonsuit was granted at the close of defendant's evidence instead of when the motion was made, at the close of plaintiff's evidence, the rule still applies that it was justifiable only on the ground that the latter evidence, under the most favorable construction it would reasonably bear, including all reasonable inferences therefrom, would support a verdict in plaintiff's favor. Hence the initial question is, Looking only to plaintiff's evidence in the most favorable light, would it support a verdict in his favor? And that turns mainly on whether there was any evidence to establish the contention that defendant failed to perform its duty in respect to furnishing a reasonably safe ladder for plaintiff's use. If not, the question whether plaintiff's evidence showed that he was guilty of contributory negligence, as a matter of law, need not be considered.

The alleged defective ladder was about twelve feet long, with hooks at the top ends of the side pieces, used to hook over the overhead shafts. While plaintiff was endeavoring to fix a belt that reached from a driving pulley to a loom, such pulley being on a shaft about two feet from the wall and twelve feet above the floor, the belt having been removed from the pulley and lying over the shaft which was revolving, and taken apart at the point where plaintiff was working at it, it was snatched out of his hand by being in some manner caught by the shaft, and wound up around such shaft near the pulley and a hanger by which the shaft

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was supported. Plaintiff took the ladder in question, and placed it in position against the wall, in order to go up and remove the belt from the shaft. The hooks were turned in so as to keep the top of the ladder about four inches away from the wall. The foot was out about three feet and a half. Plaintiff ascended to the fourth or fifth round, leaned back with his right hand hold of the ladder, and reached up with his left hand, and endeavored to remove the belt from the shaft, or away from the hanger. Finding he could not do anything further than to shove the belt away from the hanger, he started to descend, when in some way his left arm was caught and wound around the shaft, and torn off, and he was otherwise injured. The ladder was broken at the upper round on the left side, that being about sixteen inches from the top. Plaintiff testified that the breaking of the ladder caused him to make such movements as to result in his arm being caught by the shaft. On the trial the ladder was produced in court, and plaintiff testified in regard to it in substance as follows: "I had worked over a year, and always used this ladder. I used it frequently and made no complaint. It was all right so far as I knew. Thomas Cherry was associated with me as a loom fixer. We had both been on the ladder at once a short time previous. The hooks were then over a shaft, and the ladder had a slant of about eighteen inches. I have never heard any complaint about the ladder. I cannot see any rot in any part of the ladder. The grain seems to be a very poor grain. The ladder was about as far from the wall as now. It is not very straight grained." Thomas Cherry testified respecting the ladder, in substance, that he and plaintiff had both been on the ladder at the same time. There was other testimony to the effect that a ladder circumstanced as this one was at the time of the accident would be subjected to very little lateral pressure at the point where it broke; that the ladder was made of hemlock, which was rather brittle;

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that hemlock was rather poor wood for such purposes. F. H. Kemp testified as an expert that the ladder would carry two men standing quietly on it; that he would trust two men on it; that, with the base of the ladder three and one-half feet from the wall, it would carry 900 pounds steady load; that there were some symptoms of dead rot where the break occurred,—very slight, not enough to be observed except by a person of large experience; that it was not what you would call rot. There was other evidence given by plaintiff's witnesses bearing on the question, but none of which varies the foregoing. The ladder was made an exhibit, and sent to this court, with other exhibits in the case. An inspection of it fails to disclose any evidence of defects. The side pieces appear to be of good sound wood.

From the foregoing, which fairly presents the plaintiff's case, in our judgment, we are unable to say that it would support a verdict in his favor, on the charge that the ladder was not reasonably suitable for his use. The evidence is all the other way, and may properly be said to be sufficiently strong and convincing to a person of ordinary understanding to produce conviction that the ladder was broken in some other way than from plaintiff's weight upon it. Though he says it did so break, the probabilities are all the other way; and they are so strong as to be inconsistent with any reasonable theory other than that he was mistaken. The jury would not be warranted in finding the existence of a fact on the positive testimony of a witness, which is contrary to conceded facts or matters of common knowledge, or to all reasonable probabilities. *Payne v. C., R. I. & P. R. Co.* 39 Iowa, 523; *Thompson v. Pioneer-Press Co.* 37 Minn. 285. That the lateral strain on a ladder circumstanced as this one was, eighteen inches from the top, caused by the weight of a man on the fourth or fifth round, is very small, is a matter of common knowledge. That the breaking of a ladder strong enough to support two or three times plaintiff's weight, by

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the use the one in question was designed to serve, was an event not within the range of reasonable probabilities, cannot be questioned. It needs no evidence from the mouths of witnesses to establish it, and testimony to the contrary would not change it. The conclusion of the trial court that the evidence produced by plaintiff was entirely insufficient to support a verdict was clearly right. Therefore the nonsuit was properly granted.

By the Court.— The judgment of the circuit court is affirmed.

WILLIAMS, Appellant, vs. DODGE COUNTY, Respondent.

March 18 — April 7, 1897.

County liability to assistant for district attorney.

An attorney who is appointed by the court to assist the district attorney in a criminal case, under the provisions of ch. 354, Laws of 1887 (sec. 752*a*, S. & B. Ann. Stats.), is entitled to be paid in the same manner as is provided by sec. 4718, R. S., for paying attorneys appointed to defend indigent criminals, that is, upon an order entered in the minutes of the court in which the services are performed, certifying what is a reasonable compensation, and without such a certificate he cannot recover from the county for such services.

APPEAL from a judgment of the circuit court for Dodge county: A. SCOTT SLOAN, Circuit Judge. *Affirmed.*

The plaintiff, in February, 1892, was appointed by the circuit court for *Dodge* county to assist the district attorney of *Dodge* county in the prosecution of one Cook, charged with illegal banking. Thereafter *Mr. Williams* performed extensive and valuable services in such prosecution, and in November, 1892, presented his itemized bill therefor to the county board of *Dodge* county, amounting in all to $2,640.70. The board referred the bill to Hon. A. Scott Sloan, then

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judge of the circuit court for *Dodge* county, who thereafter made a report to the board recommending that *Mr. Williams'* bill be allowed at the sum of $1,331.75. Judge Sloan reported that, in his opinion, only $15 a day could be allowed under the statute, and it was this change which caused substantially the entire reduction of the bill. Upon this report the county board allowed the bill at $1,331.75 only, and the plaintiff appealed to the circuit court, and the action was referred to Hon. H. W. Sawyer, as referee, to hear, try, and determine. Testimony was received by the referee showing that the plaintiff's services were reasonably worth the amounts charged in his bill, and such testimony was not contradicted. But the referee found as the fact was that the plaintiff's bill had never been audited, certified, or allowed by any court, and for that reason was not a legal charge against the defendant county. The findings were confirmed, and judgment against the plaintiff rendered, and the plaintiff appealed.

For the appellant the case was submitted on the brief of *P. G. Lewis* and *D. Lloyd Jones*. They contended that the plaintiff's claim was in fact submitted to the judge of the court in which the services were rendered, and it was therefore unnecessary to formally submit it again under sec. 752*a*, S. & B. Ann. Stats. The only question to be decided was the value of the plaintiff's services. It was not intended by that statute to limit the compensation to be paid, otherwise that intention would have been expressed, but the amount was left to the discretion of the court.

Wm. N. Hamilton, for the respondent.

WINSLOW, J. The judgment appealed from must be affirmed. The plaintiff was appointed to assist the district attorney under the provisions of ch. 354, Laws of 1887 (S. & B. Ann. Stats. sec. 752*a*). This section provides that counsel so appointed "shall be paid in the same manner as is

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now provided by law for the payment of counsel for indigent criminals." Sec. 4713, R. S., is the section which provides for the payment of counsel who defend indigent criminals, and the terms of this section are that the county "shall *only* be liable" to pay such sum as the court in which the services are performed shall, "*by an order, to be entered in the minutes* thereof, certify to be a reasonable compensation," not exceeding $15 per day. The effect of the two sections is that counsel employed to assist the district attorney shall *only be paid* such sum as the court, by order entered in its minutes, shall certify to be a reasonable sum. No such order has been entered, or even applied for, in this case; and the consequence is that the plaintiff cannot recover. The communication of the circuit judge cannot take the place of an order of the court entered on its minutes. We do not reach the question whether the court has power to allow a greater sum than $15 a day.

By the Court.— Judgment affirmed.

THE FULLER-WARREN COMPANY, Appellant, vs. SHURTS and another, Respondents.

March 18 — April 7, 1897.

Contract: Warranty.

The plaintiff sent a written proposition to the defendants in which they said, "We herewith give you estimate and specifications for heating your new house; . . . we will furnish and set up one No. 290 furnace . . . complete and ready for use. . . . We guarantee capacity of this furnace, under proper management, to heat all rooms with registers connected with furnace" to a specified temperature, "provided that in the event of failure, we are immediately notified of such failure of said furnace so to heat said rooms. In case of said failure and notice of the same, we shall have the option of making said apparatus heat said rooms as agreed, or to remove the

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The Fuller-Warren Co. vs. Shurts and another.

same, we refunding the money paid thereon." The defendant accepted the proposition. *Held*, that it constituted a contract on the part of the plaintiff to furnish a furnace or apparatus suitable for heating defendant's house to the prescribed temperature by a volume of hot air, and its representations constituted an express warranty that it should be suitable and sufficient for that purpose; and that a furnace which was so defective as, when properly used, to send forth noxious coal gas to such an extent as to render the rooms unwholesome and unsuitable for occupancy, is not a suitable one for heating a house, though it may be able to furnish the required degree of heat; and such defect is a good defense to an action to enforce a lien for the price, of which the defendants may avail themselves without taking out and delivering the furnace to the plaintiff.

APPEAL from an judgment of the circuit court for Waukesha county: WARHAM PARKS, Circuit Judge. *Affirmed.*

This was an action to foreclose a mechanic's lien against the dwelling house of the defendant *Ann T. Shurts* and a subsequent incumbrancer of the premises, founded upon a contract, consisting of a proposition and acceptance thereof, to wit:

"Milwaukee, Wis., Sept. 6, 1894.

"Mrs. Ann T. Shurts, Waukesha, Wis.: We herewith give you estimate and specifications for heating your new house on lot 9, block 6, Hadfield's addition, Waukesha, Wis., as follows: We will furnish and set up one No. 290 furnace, inclosed in galvanized iron case, and properly connected to chimney, with good galvanized iron smoke pipe, and to furnish all heating pipes, properly connected to stacks and registers, according to certain specifications, leaving the furnace complete and ready for use, for the sum of $225, with a guaranty of the capacity of the furnace, under proper management, to heat all rooms with registers connected with furnace, on first floor, to 70 degrees F., when temperature outside indicates 20 degrees below zero, and at the same time to heat all rooms on the second floor, connected with the apparatus, to 70 degrees; *provided* that, in the event of

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failure, we are immediately notified of such failure of said furnace so to heat said rooms. In case of said failure, and notice of the same, we shall have an option of *making said apparatus heat* said rooms as agreed, or *to remove the same;* we refunding the money paid thereon.

[Signed] "THE FULLER-WARREN COMPANY,
"By W. H. BOWERS."

At the foot was an acceptance, signed by the defendant, as follows, to wit: "The above proposition is satisfactory, and I accept the same.

The plaintiff is a corporation engaged in the business of manufacturing and selling stoves, ranges, furnaces, etc. The defendant, admitting the execution of the contract and guaranty, alleged that said furnace, having been set up, was fully tested, and proved to be entirely unsatisfactory and deficient, and that the plaintiff was notified of the defects and failure to comply with the terms and conditions of the warranty in November, 1894, and that it was turned over to said plaintiff because of said defects and failures; that the plaintiff thereupon took charge of the furnace, and attempted to remedy said defects and make it comply with the warranty, but that it had wholly failed to do so, and that in consequence it then was, and always had been, defective and dangerous, and unfit for use as a furnace, in that it did not properly heat said house, and that by reason of the generation and escape of gases therefrom it had been and was dangerous to the health of the defendant and the members of her family occupying the house; that it had never been accepted, and had been a source of great annoyance and damage, and was absolutely valueless. The answer contained a counterclaim for damages.

At the trial the court found that the contract and guaranty had been executed as stated, and that, upon test of the furnace after it was set up, it proved to be defective and unsatisfactory, under the requirements of the contract, or for

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the necessary use for which it was designed, of which the plaintiff had immediate notice; that it attempted to remedy such defects, and during the winter of 1894–1895 attempted to put said furnace and apparatus in proper condition to perform its functions under the agreement, and serve the purpose for which it was designed, but failed to make the same comply with said written guaranty; that it had at all times leaked gas, to such an extent that it was dangerous to the inmates and occupants of the dwelling house, so that the defendant could not use or burn coal therein, but was obliged to burn coke exclusively; and that said furnace became and was a nuisance to said defendant *Shurts*, and to her dwelling house. The court found that the plaintiff was not entitled to payment for said furnace, or to the relief prayed for, and that the complaint should be dismissed, with costs. Judgment was entered accordingly, from which the plaintiff appealed.

For the appellant there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *C. F. Fawcett.* They argued, among other things, that the plaintiff's claim was not simply for the price of goods sold, but for an improvement upon real estate, and that the theory of an implied warranty of fitness was not applicable. 1 Parsons, Cont. 589; 1 Benj. Sales, § 108. Neither would the doctrine of implied warranty apply if the contract be deemed one for the manufacture and sale of goods, because it was for certain specified things, and they were in fact furnished. *Milwaukee Boiler Co. v. Duncan*, 87 Wis. 120. Nothing was said in the contract about the kind of fuel for which the furnace was to be adapted. The only unfitness shown was to burn coal,—it was fit to burn coke. The contract was fully performed by furnishing the kind of furnace specified, having the required heating capacity, and by properly setting it up in the house. The defects shown might be ground for some abatement of price or recoupment of damages. To

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defeat the action the defendants, not having returned or offered to return the property, must show that it is entirely worthless, or that they have sustained damages exceeding its value. *Warder v. Fisher*, 48 Wis. 338, 341.

D. S. Tullar, for the respondents.

PINNEY, J. The finding of facts is, we think, supported by the evidence; and the only question is whether, in view of the facts found and uncontradicted evidence, there had been a substantial performance of the contract on the part of the plaintiff. If not, the plaintiff could not recover. It was shown that the whole heating apparatus, including the pipes built in the walls, the registers, and the foundation in brick and cement, constituted *the complete furnace*, or heating apparatus, described in the contract; and it was claimed that it could not be taken out without injury to the house, rendering repairs necessary, although the defendant had agreed to construct the apparatus "so that pipes and boxes could be removed without disturbing the plaster or defacing the ceiling." The substance of the transaction was that the plaintiff proposed to furnish a furnace or apparatus *for heating the defendant's new house*, and to guarantee that it should have a certain prescribed heating capacity. It was claimed that the furnace did not have the stipulated heating capacity, and that it would not heat a part of the upper portion of the house unless crowded with fuel to such a degree as to render the rooms on the lower floor uncomfortable, and that, owing to defective construction or disposition or arrangement of its parts, it generated gas to such an extent as to render the rooms uncomfortable and unwholesome. The plaintiff was notified of these defects, and made certain alterations in order to remedy them, but with the result that probably the heating capacity of the furnace may have been improved, but the difficulty in respect to the generation of gas was really increased, and to such an extent that

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it was not possible to use coal for fuel, and the house could be made comfortable only by the use of coke. In March, 1895, the plaintiff drew on the defendant for the amount claimed for the furnace, but the draft was returned unpaid, and on the 27th of the same month it was notified that the furnace was not accepted, and payment would not be made until the plaintiff put it in proper shape, and that the defendant felt that it would be better that the furnace be taken out entirely. The defects in the furnace had in the meantime been the subject of frequent complaints.

It is not material to consider whether there was an implied warranty that the furnace or heating apparatus should be suitable for the purpose intended. The contract imports, in substance, an express undertaking to that effect; and the conduct of the plaintiff, in attempting to remove both of the defects complained of, shows that it so understood it. It was, in substance, a contract to furnish a furnace or apparatus suitable for heating the defendant's house to a prescribed temperature by means of a column of hot air being drawn through the furnace and its pipes and registers into the several rooms of the house. A furnace so defective that, when properly used, the necessary heated column of air drawn through it for heating purposes is necessarily and unavoidably freighted with noxious coal gas, to such an extent as to render the rooms unwholesome and unsuitable for occupancy, is not, in any sense of the word, a furnace or apparatus fit or suitable for heating houses. No intelligent person would understand, from the language employed, that such a furnace or apparatus would meet the fair meaning of the parties, or that it was the subject in respect to which they were contracting. It cannot be fairly said that the defendant has got what she bargained for.

The contract contains, in our judgment, what must be regarded as, in substance, a representation or assertion on the part of the plaintiff, amounting to an *express* warranty,

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that the furnace or apparatus specified in the plaintiff's offer, which she accepted, would be suitable "for heating her [your] new house." The language used forbids any possible inference that a furnace having the specified heating capacity, but with the use of which the generation and filling the house with noxious and unwholesome coal gas was an inseparable and necessary incident of its use, was the furnace or heating apparatus contracted for, and a consideration of the law in respect to implied warranties becomes unnecessary. It is a matter of common knowledge that furnaces in use in the Western country are constructed and designed for burning coal for fuel. We cannot indulge in any presumption that the furnace intended may have been one for burning coke.

The defendant properly refused to accept the furnace, and desired that it be taken out entirely, and practically, so far as it was within her power, returned it or tendered it to the plaintiff. The plaintiff had stipulated for such right of removal in case it failed to properly heat the rooms. We do not think that the rule in *Warder v. Fisher*, 48 Wis. 338–341, is applicable, inasmuch as the defendant had done all reasonably within her power to put herself in a proper position to defeat the plaintiff's claim on account of a want of substantial performance of the contract on its part. She was not bound, in order to avail herself of her right of defense, to take out the furnace, and transport and deliver it to the manufacturers, at their place of business in Milwaukee. It was contemplated, if occasion for removing it occurred, that such duty was to rest upon the plaintiff. We hold, therefore, that judgment was rightly given for the defendant.

By the Court.— The judgment of the circuit court is affirmed.

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HANSON, Appellant, vs. GUNDERSON and another, Respondents.

March 18 — April 7, 1897.

Contract: Statute of frauds: Parol evidence.

A contract by partners to hire an employee for five years at stipulated wages to be paid monthly is required by the statute of frauds to be in writing, and it cannot be changed or superseded by a contemporaneous or a subsequent parol agreement so that, instead of a joint liability of the partners, each of them shall be responsible for only one half of such wages; nor is parol evidence of such an agreement admissible in an action upon the written contract.

APPEAL from a judgment of the circuit court for Dodge county: WARHAM PARKS, Circuit Judge. *Reversed.*

The plaintiff is by trade a blacksmith. The defendants were copartners, carrying on a blacksmithing business. The plaintiff hired to them to work at his trade for five years for agreed wages, to be paid at the end of each month. The contract was reduced to writing. At the same time and before the parties had separated, there was an oral agreement that the defendant *Gunderson* should pay one half of the wages each month, and that the plaintiff should look to the defendant *Hanson* for the other half of his wages. The defendant *Hanson* was the son of the plaintiff, and lived in his family. The defendant *Gunderson* did pay, regularly and promptly, one half of the wages. No more wages was paid. The defendant *Hanson* absconded. This action is brought to recover the unpaid one-half of the plaintiff's wages. The defendant was permitted to prove the oral arrangement, and the jury was instructed that, in case they should find that such an agreement was in fact made, a compliance with it by the defendant *Gunderson* on his part would be a complete defense to the action. There was a verdict and judgment for the defendants, from which the plaintiff appeals.

For the appellant there was a brief by *Sawyer & Sawyer*,

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and oral argument by *E. W. Sawyer*. To the point that a written contract falling within the statute of frauds cannot be varied by a subsequent oral agreement of the parties, they cited *Goss v. Lord Nugent*, 5 Barn. & Adol. 58; *Marshall v. Lynn*, 6 Mees. & W. 109; *Stowell v. Robinson*, 3 Bing. N. C. 927; *Harvey v. Grabham*, 5 Adol. & El. 61.

H. K. Butterfield, for the respondents, contended that the modifying contract in this case was subsequent to the writing and may be proved by parol. *Brown v. Everhard*, 52 Wis. 205. The part which was modified was not within the statute of frauds. Parol evidence is competent to show how the firm was to make payment. *Jones v. Keyes*, 16 Wis. 563; *Irvine v. Adams*, 48 id. 468; *Riley v. Gregg*, 16 id. 666.

NEWMAN, J. The stipulation in the written contract relating to the payment of the plaintiff's wages is, by implication of law, joint in its obligation, and not several. It is not satisfied, as to either partner, by the payment by either of less than the full agreed wages. Each is jointly liable with the other for the entire wages. Parol evidence of a contemporary agreement or understanding that the obligation should be several, and satisfied as to each partner upon payment by him of one half, tends to contradict and vary the terms of the written instrument, and is inadmissible, under the familiar rule on the subject. Contemporaneous oral negotiations and agreements are deemed to be either merged in or superseded by the writing. So, unless the oral stipulation relied on by the defendant *Gunderson* can be supported as a valid subsequent agreement modifying the written agreement, it must be held that the admission of oral evidence to prove it was error. It looks more like a method adopted for the convenience of the defendants of carrying out the contract on their part than a deliberate purpose to change the contract itself. The plaintiff had but imperfect understanding of the English language. After

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the contract had been signed, he asked, "Who is going to pay me my wages?" After a moment's consultation with his partner, *Gunderson* said, "Each one of us will pay you one half,— to be paid monthly." The plaintiff said, "All right." That is, in substance, all there was of it. If this shall be deemed to have been intended as a change of the written agreement, it must be inquired whether it could work a change in or supersede the writing. The contract was, by its terms, not to be performed within a year; so was required, by the statute of frauds, to be in writing. While the rule is quite general that written agreements may be changed or superseded by subsequent parol agreement, contracts required to be in writing by the statute of frauds are a well-established exception. Reed, Stat. Frauds, § 454; 17 Am. & Eng. Ency. of Law, 448. This change would affect the contract in an essential particular, in which, by its terms, it was not to be performed within a year. An oral agreement covering that particular is void by the express terms of the statute. Parol evidence to establish it is inadmissible. The charge was fundamentally wrong on this question.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded for a new trial.

TORREY CEDAR COMPANY, Appellant, vs. EUL and others, Respondents.

March 19— April 7, 1897.

Fraudulent conveyances.

A conveyance by a father to his children of all his land, including his homestead, the whole of which is heavily incumbered by mortgage, they paying a full and adequate consideration for his equity of redemption therein, is not rendered fraudulent as to creditors of the father by the fact that they also agreed to support him during life.

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Torrey Cedar Co. vs. Eul and others.

APPEAL from a judgment of the circuit court for Oconto county: S. D. HASTINGS, JR., Circuit Judge. *Affirmed.*

This is a creditors' suit. The plaintiff was a judgment creditor of the defendant *Theodore Eul, Sr.*, by judgment for $2,637.72, rendered and docketed December 14, 1891, on which execution had been returned unsatisfied. November 12, 1889, and after the incurring of the indebtedness on which said judgment was rendered, the defendant *Eul, Sr.*, who was then sixty years of age, conveyed to his son and daughter (*Theodore, Jr.*, and *Grace*), in common, 220 acres of land, which he had owned for a number of years, in Shawano county, forty acres of which was his homestead. The son and daughter were, respectively, twenty-nine and twenty years of age, unmarried, and living with their father on the premises; the son working the farm, and the daughter keeping the house. Evidence showed that the homestead was worth about $2,500, and the balance of the land $2,000, and that there was a mortgage on the entire property of $1,500. *Eul, Sr.*, had recently married a young wife, who was not living with him. He was, in fact, insolvent and unable to pay his debts. The defendants' evidence tended to show that *Eul, Sr.*, then owed his son nearly $1,500, and his daughter about $500, for their work during a series of years, and that they desired their pay, and that it was arranged that $200 cash additional should be borrowed, and the amount added to the $1,500 mortgage. This sum was to be paid to the wife, and she was to release her dower in the whole premises, and then the entire premises were to be deeded to the son and daughter, who were to cancel their claims against their father, assume to pay the $1,700 mortgage, and also furnish the father certain cash and certain specified articles of provisions, etc., annually, for support during his life. This arrangement was carried out, and the conveyance executed, and also a contract of support, secured by a mortgage on the premises, running

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from the children to their father. This transaction is attacked as fraudulent as to creditors.

The court found that the conveyance was made in good faith, and not fraudulently; that the debts claimed to be due the son and daughter were valid debts to the amount claimed; and that the contracts for support did not render the conveyance invalid; and dismissed the complaint. From this judgment the plaintiff appealed.

E. J. Goodrick, for the appellant, argued, *inter alia*, that a conveyance by a person who is largely indebted, to his children, raises a strong suspicion of fraud, and casts upon the grantees the burden of proving actual consideration and good faith in the transaction. *Plummer v. Rummel*, 26 Neb. 142; *Reynolds' Adm'rs v. Gawthrop's Heirs*, 37 W. Va. 3; *Jones v. Simpson*, 116 U. S. 609; *Starin v. Kelly*, 88 N. Y. 421; *Spence v. Smith*, 34 W. Va. 697; *Hoboken Bank v. Beckman*, 36 N. J. Eq. 83.

For the respondents there was a brief by *M. J. Wallrich*, attorney, and *Greene, Vroman & Fairchild*, of counsel, and oral argument by *B. L. Parker*.

WINSLOW, J. The findings of fact cannot be disturbed, because they are supported by sufficient evidence. The transfer of the homestead cannot be attacked, because it was exempt. The $1,700 mortgage was practically a first lien on the 180 acres of land outside of the homestead, because that must first be sold in case of foreclosure. *Rozek v. Redzinski*, 87 Wis. 525. There was left, therefore, an equity of redemption amounting to $300 in the non-exempt land, which the appellant could reach in case the conveyance was fraudulent. The court below was of opinion that the children paid a full and adequate consideration for this equity of redemption, and that the fact that the children also agreed to support their father in consideration of the transfer of the exempt homestead and this small and problematical

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equity of redemption did not render the conveyance void as to creditors. In this conclusion we agree.

By the Court.— Judgment affirmed.

FLATLEY, Respondent, vs. PHENIX INSURANCE COMPANY, Appellant.

March 19 — April 7, 1897.

Insurance: Construction of policy.

1. A fire insurance policy, issued in the form prescribed by ch. 195, Laws of 1891, before that act was declared unconstitutional, must be regarded as depending for its validity and construction wholly upon the consent of the parties.
2. Where a policy clearly specifies numerous grounds of invalidity or forfeiture, but does not include among them the "failure to furnish satisfactory proofs of loss" within sixty days after its occurrence, as stipulated in such policy, the courts will not raise a forfeiture by implication from such failure, but will hold the effect thereof to be simply to postpone the time for payment of the loss until the expiration of the time stipulated therefor after such proofs are furnished.

APPEAL from a judgment of the circuit court for Oconto county: S. D. HASTINGS, JR., Circuit Judge. *Affirmed.*

This was an action upon a policy of insurance, issued by the defendant company to the plaintiff, in the sum of $500, to wit, $300 on his building, and $200 on his stock of liquors and saloon fixtures therein. The property insured was totally destroyed by fire, June 14, 1895, notice of which was immediately given to the defendant; but proof of loss was not furnished to it until more than sixty days after the fire, namely, October 8, 1895. After the lapse of more than sixty days thereafter, the loss remaining unpaid, this action was brought for its recovery. The defense relied on is that by the failure to furnish the defendant with proof of loss

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within sixty days after the fire, as required by the policy, the plaintiff was precluded from recovering the amount of the loss. The policy contained, among others, the following provisions: "The sum for which this company is liable, pursuant to this policy, shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of loss have been received by this company, in accordance with the terms of this policy." "If fire occur, the insured shall give immediate notice of any loss thereby, in writing, to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon, and within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire," etc. The policy did not provide that it should be void, or that no recovery should be had thereon, in case of the failure to furnish proof of loss within the stipulated period of sixty days, but it did contain many provisions expressly rendering the policy void upon other grounds, and that, in certain cases therein stated, the company would not be liable, or the policy should immediately cease. These facts appearing upon trial by the court, there was a finding in favor of the plaintiff for the amount of the policy and interest, upon which he had judgment, from which the defendant appealed.

For the appellant there was a brief by *Mylrea, Marchetti & Bird*, and oral argument by *W. H. Mylrea*. They argued, among other things, that the furnishing of proofs of loss promptly to the underwriter was a matter of the utmost importance, to enable it to ascertain the facts and prevent further loss. The express provisions of the policy that proofs of loss be furnished within sixty days after the fire

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unless such time is extended in writing by this company, and that the loss is payable sixty days after such proofs have been received *in accordance with the terms of this policy*, are to be given effect as limitations. The furnishing of the proofs within sixty days is a condition precedent to a recovery on the policy. Wood, Fire Ins. (2d ed.), 927; May, Ins. § 465; Ostrander, Fire Ins. § 221; *Oshkosh Match Works v. Manchester F. Ass. Co.* 92 Wis. 510; *Quinlan v. Providence-Washington Ins. Co.* 133 N. Y. 362.

For the respondent there was a brief by *Webster & Classon*, and oral argument by *D. G. Classon.*

PINNEY, J. There is no substantial difference between the provisions of the policy upon which this action is founded, in respect to the defense relied on, and the provisions in the case of *Vangindertaelen v. Phenix Ins. Co.* 82 Wis. 112–117. The policy must be regarded as depending, for its validity and construction, wholly upon the consent of the parties, and not as a policy prescribed by the authority of the state, under ch. 195, Laws of 1891, the provisions of which were declared unconstitutional in *Dowling v. Lancashire Ins. Co.* 92 Wis. 63. The courts will not declare or raise a forfeiture of an insurance policy by implication, and where, as in this case, numerous grounds of invalidity or forfeiture are clearly specified as such in the policy, it is not fairly permissible, as a matter of construction, to accord to a mere breach of a stipulation contained in the policy the effect imputed to it by the defendant in its defense. As it did not see fit to exact a stipulation of invalidity or forfeiture in case of a breach of the stipulation, and exacted it as to very many other matters, the conclusion is an entirely justifiable one that it was not intended that any such consequence should flow from its breach, but that the defendant intended to rely on such other remedy as the law might afford. *Coventry M. L. S. Ins. Asso. v. Evans*, 102 Pa. St. 281–284.

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Failure to furnish proof of loss within sixty days after the fire would not operate as a forfeiture of the policy, nor defeat a recovery by the assured. This was held in the case of *Vangindertaelen v. Phenix Ins. Co.* 82 Wis. 112, decided previous to the decision in the case of *Quinlan v. Providence-Washington Ins. Co.* 133 N. Y. 356, relied on by the defendant, and in which a contrary conclusion was reached. The view adopted by this court had prevailed in *Kenton Ins. Co. v. Downs*, 90 Ky. 236; *Tubbs v. Dwelling-house Ins. Co.* 84 Mich. 646, and *Coventry M. L. S. Ins. Asso. v. Evans*, 102 Pa. St. 281; and to it we still adhere. Forfeitures are not favored and will not be implied, and clauses relied on as creating them are to be strictly construed. The provision that "the sum for which this company is liable, pursuant to this policy, shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of loss have been received by this company in accordance with the terms of the policy," does not declare or provide for any forfeiture, or that the policy shall cease or become invalid if the proofs are not so furnished; nor does the clause prescribing that the proofs of loss shall be furnished "within sixty days after the fire, unless such time is extended in writing by this company," have that effect, or materially influence the question. The provision is not that the loss on the policy shall not become due and payable *unless* proof of loss shall be furnished within the sixty days specified, but, in substance, that "the sum for which this company is *liable*, pursuant to the policy, shall not *be payable* until sixty days after due notice, ascertainment, estimate, and satisfactory proof of loss have been received by the company, in accordance with the terms of the policy." The delay in furnishing the proofs until October 8, 1895, merely operated to postpone the maturity of the claim until sixty days thereafter. For these reasons, judgment was properly given for the plaintiff.

By the Court.— The judgment of the circuit court is affirmed.

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RYSDORP, Respondent, vs. THE GEORGE PANKRATZ LUMBER COMPANY, Appellant.

March 19 — April 7, 1897.

Master and servant: Negligence: Special verdict.

1. In an action for a personal injury to a foreman in the defendant's sawmill, caused by the breaking of a nut which supported the sleeve or covering of the band-saw, thus letting such sleeve fall upon the plaintiff's hand, which he had put under such sleeve to examine the machinery instead of using the manhole provided for that purpose, which was safe, the jury by special verdict found that the nut was broken prior to the accident; that with it so broken the machine was not reasonably safe for use in the mill; that its condition could have been discovered by the defendant by the exercise of ordinary care; and that the plaintiff was not negligent. *Held*, that such verdict would not support a judgment for the plaintiff, for the reason that it failed to find that the use of the machine in that condition was negligence as against the plaintiff, or that such negligence was the cause of the accident.
2. Such verdict was also inconsistent in that it, in effect, held the defendant to a higher degree of care as to its machinery than the plaintiff, on whom it relied as an expert.
3. Upon the evidence, the defendant was free from negligence, but the plaintiff must be held to have been guilty of negligence in putting his hand under the sleeve to do work there instead of using the manhole which had been provided by the defendant, where it would have been safe, and, knowing the danger, he by so doing assumed the risk.

APPEAL from a judgment of the circuit court for Oconto county: S. D. HASTINGS, JR., Circuit Judge. *Reversed.*

The action is for a personal injury. The defendant owned and operated a sawmill. The plaintiff was foreman of defendant's mill. He was thirty-nine years old, and an experienced millwright and foreman. Defendant's mill was what is called a single-band sawmill. The frame which supports the saw, and by which proper tension is given to it, is a hollow cylinder of iron, in two parts. The outer and upper portion, which is called the sleeve, covers the upper

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part of the lower section, and rests upon a shoulder upon such lower section. The saw passes over a wheel or pulley, which is supported by this cylinder, and around another similar wheel, which is beneath the floor of the mill. In order to give proper tension to the saw, the upper or sleeve portion of the cylinder, with the pulley and shafting, is raised by means of a jackscrew. This jackscrew works in a nut in the lower end of the sleeve. It is worked by a lever. The sleeve, with its burden, weighs about three tons. There is a slot in the lower end of the sleeve some eighteen inches in length and several inches in width. When the sleeve is raised, a space is opened into the cylinder above the end of the lower portion through which a man's arm can be thrust. This slot was intended to give space for levers or bars connecting with appliances within the cylinder for the regulation of the tension to pass. In the base of the lower section of the cylinder were what are called "manholes," for the purpose of admitting the hand for whatever needful purpose of adjusting weights on the weight rod or other appliances within the cylinder. This was a perfectly safe place for the introduction of the hand for such a purpose. The plaintiff was acquainted with this machinery, and the purpose of these holes. On the morning of the accident, when plaintiff came into the mill, he found two men at the lever, trying to turn the jackscrew, in order to put tension on the saw. Complaint was made that it worked hard. Some one suggested that the weights were caught inside the cylinder. Plaintiff at once put his hand through the slot, and found the weight rod free. He called out that the weights were not caught. The men surged upon the lever. The sleeve fell, and the plaintiff's right hand was severed from his arm. The strain upon the screw had broken the flange from the nut, and taken away its support from the sleeve.

There was a special verdict, which finds (1) that the nut was cracked and broken prior to the time of plaintiff's acci-

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dent; (2) that with the nut so cracked and broken the machine was not reasonably safe for use in the mill; (3) that the defendant could have discovered this unsafe condition of the machine by the exercise of ordinary care; (4) that the plaintiff could not have discovered this unsafe condition of the machinery by the exercise of ordinary care; (5) that there was no contributory negligence on the part of the plaintiff; and (6) damages assessed at $8,000. Judgment was entered on this verdict in favor of the plaintiff, from which the defendant appeals.

E. C. Eastman, for the appellant, argued, *inter alia*, that the plaintiff assumed the risk of the injury received by him. The defendant had furnished him a practically safe way for reaching and adjusting the machinery, and he, with knowledge of the danger, chose an unsafe way. *Amerine v. Porteous*, 105 Mich. 347; *Welsh v. Argyle*, 89 Wis. 649. The alleged negligent act of the defendant was not the proximate cause of the plaintiff's injury. No such injury could reasonably have been anticipated therefrom. There was nothing about the usual operation of the machinery which would naturally require a workman to put his hand in the slot where the plaintiff's was when injured. *Block v. Milwaukee St. R. Co.* 89 Wis. 371, 378; *Huber v. La Crosse City R. Co.* 92 id. 636, 646, 648; *McGowan v. C. & N. W. R. Co.* 91 id. 147, 155; *Atkinson v. Goodrich Transp. Co.* 60 id. 141, 156; *Harris v. Cameron*, 81 id. 239. The special verdict does not cover all the material issues.

For the respondent there were briefs by *Greene, Vroman & Fairchild*, and oral argument by *C. E. Vroman*.

NEWMAN, J. Two principal errors are claimed: (1) That the special verdict is insufficient to support the judgment; and (2) that the evidence fails to establish defendant's negligence.

The criticism on the verdict is that it fails to find that the unsafe condition of the mill was negligence, or that it

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caused plaintiff's accident. It is elementary that, in order to make the defendant liable, the unsafe condition of the mill must be by fault of the defendant, and must have been the cause of the accident. Both these elements must be found as facts by the proper trier of the issues of fact; if in doubt upon the evidence, by the jury,—if not in doubt upon the evidence, then by the court. If the proper inference to be drawn from the undisputed facts is disputable, then the inference is to be drawn by the jury, and the court cannot supply the want of it. The verdict must find all the facts essential to the plaintiff's right of recovery, and in his favor, or the plaintiff cannot have judgment upon it. It is essential that the fault of the defendant shall have been such as, in the circumstances, to be negligence. It is found only that "the machine was not safe to be used in the mill." That does not necessarily establish that the use of it was negligence, as against the plaintiff. The finding is equivocal. Apparently its unsafety consisted in the danger that it would wreck the machine or mill. It cannot be said that the danger that some person would be injured by it was conspicuous. So this inference was to be drawn by the jury. If it were found that the use of the machine in its actual condition was negligence, the liability of the defendant is not yet established until it is further found that such negligence was the cause of the accident. Negligence is the cause of the accident, in a legal sense, only when it is of such a character as that men of ordinary prudence, judgment, and experience ought reasonably, in the light of the attending circumstances, to have foreseen that it was likely to produce such an accident. *Klatt v. N. C. Foster L. Co.* 92 Wis. 622. Surely, the incidence of such an accident was not so plainly imminent as that the court can say, as matter of law, that the defendant was bound to foresee it.

The special verdict is insufficient to support the judgment. The verdict is, in some respects, incongruous. It finds that

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the defendant could have learned of the defect in the machine by the exercise of ordinary care, but that the plaintiff could not. This really seems to apply one standard of care to the defendant, and another, and a more liberal one, to the plaintiff. It is argued that the fact that the jackscrew worked hard should have been sufficient notice to the defendant that the machine was out of order, but the same fact is not deemed to be sufficient notice to the plaintiff; while, in fact, the plaintiff is the only person about the mill who is shown to have been an expert in mill machinery, and, as might be supposed, the one most likely to apprehend the cause of the difficulty. He also knew the purpose of the slot, that it was for room for the lever to travel up and down in, and for no other purpose. He also knew the purpose of the manhole, that it was "for getting in there in case you want to do any work in there." He knew also that when his hand was through the manhole for any purpose no injury could happen to him by the falling of the sleeve. He knew, at the time, that he could, with entire safety, make the investigation which he wished of the condition of the weights and rod through the manhole. But he says he did not think of it. He knew the safe way which had been provided for the purpose, but, from want of thought, took a more convenient, but less safe, way. It certainly seems that when the defendant had provided a safe way, which was known to the plaintiff, it had done its full duty toward him, and that his choice of a different way was at his own risk. *Welsh v. Argyle*, 89 Wis. 649. His forgetfulness, or want of thought, was not the fault of the defendant, but rather his own misfortune. Certainly, the plaintiff must be held to have assumed the risk of all such dangers of the employment as he understood or could learn by the exercise of reasonable attention. The evidence fails to establish the defendant's negligence.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded for a new trial.

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LOMBARD, Appellant, vs. MCMILLAN and another, Respondents.

March 22 — April 7, 1897.

Constitutional law: Remedies: Action to recover land sold for taxes: Parties: Pleading: Waiver.

1. The provision of ch. 278, Laws of 1883, requiring as a condition for the maintenance of an action by the former owner to recover land conveyed by a county holding a tax title thereon to the state, and subsequently sold by the state, that the plaintiff shall pay into the county treasury the amount of taxes paid since the sale, with costs and expenses, is not in conflict with sec. 9, art. I of the state constitution, securing to every one a certain remedy in the law for all wrongs, etc., without purchase, etc., since such payment is not absolute, but is a deposit pending the suit, and the money is to be returned to the plaintiff in case he fails to recover the land.
2. The failure of the plaintiff in such an action to deposit the amount of such taxes as required by that statute as a condition of maintaining his suit is matter in abatement. If it appears on the face of the complaint it may be taken advantage of by demurrer, otherwise only by plea in abatement, and if not so raised the objection is waived.
3. The state having conveyed the lands is under some obligation to make the title good to its grantee, and the provision of ch. 301, Laws of 1885, allowing the state to be made a party defendant to pending actions to recover such lands in order to protect its own interest, does not contravene any constitutional right of the plaintiff therein.
4. There is nothing in the provision of ch. 74, Laws of 1889, that the title acquired by the state under deeds taken pursuant to the act of 1885, to lands conveyed by it to private persons prior to taking such new deeds, shall inure to the benefit of such persons, to change the relation of the state to such lands, or its obligation to maintain the title.

APPEAL from a judgment of the circuit court for Marathon county: S. D. HASTINGS, JR., Judge. *Affirmed.*

This was an action of ejectment. Plaintiff held the original title to the lands which formed the subject of the action.

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Defendant *McMillan* claimed title to such lands through mesne conveyances from Marathon county and the proceedings hereafter referred to. The lands were of the class designated as "Marathon County Lands" by sec. 184, R. S. 1878.

The history of defendant *McMillan's* title is as follows: Prior to the conveyance to the state hereafter mentioned, the lands were tax-deeded to Marathon county by tax deeds void on their face, some for omission of the words "as the fact is," required by statute, and some for failure to name the state as grantor. By ch. 22, Laws of 1867, Marathon county was authorized to convey to the state tax-title lands, and tax-sale certificates thereon, owned by it, in payment of its delinquent dues. Pursuant to such chapter the lands in question were so conveyed June 3, 1867, and tax-sale certificates thereon owned by the county were delivered to the state. By ch. 278, Laws of 1883, it was provided, among other things, as follows: "No action shall be commenced, maintained or prosecuted by or on behalf of the original owner, or any person claiming title through or under such owner to recover possession of, or in any way involving the title to any lands heretofore conveyed to the state of *Wisconsin* by any county in the state, or attempted to be so conveyed and sold by said state of *Wisconsin* to any private party or parties, until all taxes levied and assessed upon and against the same, from the date of the sale thereof by the said state, together with all legal charges for assessing and collecting the same, and interest thereon . . . shall have been paid into the county treasury of the county in which such lands shall lie; nor until all delinquent taxes levied upon and returned against said lands and remaining unpaid when the same were so conveyed, or attempted to be, to the state together with the like interest thereon shall have been paid into such county treasury; which moneys shall be retained in said county treasury to abide the event of such action,

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and shall be returned to the party paying or depositing the same if he shall fail to maintain such action; otherwise, so much thereof as covers the delinquent taxes above mentioned and interest thereon at the rate aforesaid, shall be retained by such county, and the remainder shall be paid over to the party or parties purchasing the same from the state, his or their legal representatives." Further provision was made giving plaintiffs a reasonable time to make the deposit required in actions pending at the time of the passage of the act, and for a dismissal of such actions for failure so to do. The lands in question were conveyed to George Weller in 1876, and by him conveyed to defendant *McMillan* in 1879. This action was commenced February 11, 1885, against *McMillan* only. Thereafter ch. 301, Laws of 1885, was passed, authorizing the state to take tax deeds upon Marathon county lands, where it held certificates subject to such deeds delivered to it by Marathon county under the act of 1867; also, to take tax deeds valid in form in place of invalid tax deeds, under which the county claimed title at the time the lands were conveyed to the state pursuant to such act. Such chapter provided as follows: "Such deeds shall vest in the state an absolute estate in fee simple in the lands therein described, and shall be presumptive evidence of the truth of the recitals in such deeds contained, and of the regularity of all the proceedings from the valuation of the lands by the assessor, up to and including the execution of the deeds. . . . Such tax deed or deeds . . . shall be conclusive evidence of absolute title to said lands in the state, unless . . . adjudged to be void in some action now pending, or which shall be brought within nine months after the recording of such tax deed or deeds to which the state shall have been made a party." The act further provided for making the state a party defendant in pending actions. In September and December, 1885, new tax deeds were taken by the state under the aforesaid act. By ch. 74,

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Laws of 1889, it was provided, in effect, that the title acquired by the state under deeds taken pursuant to the act of 1885 to lands conveyed to private persons before the taking of such new deeds should inure to the benefit of such persons.

The complaint was in the usual form. Defendant *McMillan* answered by a general denial. In 1893 *McMillan* applied to the court to have the state made a defendant, pursuant to the act of 1885. Such motion was granted, and plaintiff excepted thereto. Such proceedings were thereafter had that the state answered, setting forth the facts respecting the title under which defendant claimed the lands, and pleaded, in abatement of the action, noncompliance by plaintiff with the law requiring deposit of the amount of unpaid taxes with the county clerk as a condition precedent to the commencement of the action. Judgment was demanded abating the action on that ground, and for costs and disbursements. The case was tried before the court. The facts were found in defendants' favor as set forth in the plea in abatement. Judgment abating the action was ordered, and entered accordingly. Exceptions were duly filed, and plaintiff appealed.

For the appellant there was a brief by *Brown & Pradt*, and oral argument by *Neal Brown*. They argued, *inter alia*, that the failure of the plaintiff to pay into the county treasury the taxes assessed on the land sought to be recovered since the tax sale, with legal charges, required by ch. 278, Laws of 1883, as a condition of maintaining his action, was matter in abatement, and the original defendant, having simply pleaded a general denial, could not avail himself of it. *Martin v. Pugh*, 23 Wis. 184; *Brown Co. v. Van Stralen*, 45 id. 675; *Dutcher v. Dutcher*, 39 id. 651; *Sanford v. McCready*, 28 id. 103; *Ewen v. C. & N. W. R. Co.* 38 id. 613. By failing to plead it in abatement he waived it. *Spain v. Johnson*, 31 Ark. 314; *Stiles v. Horner*, 21 Conn. 507;

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York's Adm'r v. Gregg's Adm'x, 9 Tex. 85. It is a personal plea, and defendant cannot avail himself of the plea put in by the state, eight years after the suit was commenced. *Bowzey v. Redman*, 40 Me. 336; *Savage Mfg. Co. v. Armstrong*, 17 id. 34; *Vose v. Manly*, 19 id. 331. It was waived by delay. *Conley v. Good*, 1 Ill. 135; *Archer v. Claflin*, 31 id. 317; *Holloway v. Freeman*, 22 id. 197; *Pearce v. Swan*, 2 id. 266. Ch. 278, Laws of 1883, is unjust and violates the constitutional provision securing justice to all freely and without purchase. *Conway v. Cable*, 37 Ill. 82; Cooley, Taxation, 550, 552, 553; *Lassitter v. Lee*, 68 Ala. 287; *Wilson v. McKenna*, 52 Ill. 43; *Weller v. St. Paul*, 5 Minn. 95; *Madland v. Benland*, 24 id. 372; *Green v. Biddle*, 8 Wheat. 1; *Crowley v. Utley*, 74 Me. 49; *Straw v. Poor*, id. 53. The burden of proof is upon the defendant to show that the taxes the plaintiff is required to pay are legal. It is unjust to require him to pay illegal taxes. *Hart v. Henderson*, 17 Mich. 219; *Sillsbee v. Stockle*, 44 id. 561. The taxes upon the lands in suit were illegal. Ch. 278 is also unconstitutional in that it deprives the plaintiff of a valuable property right, viz. the interest on his money paid into the treasury. *In re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People ex rel. Manhattan Sav. Inst. v. Otis*, 90 N. Y. 48; Hare, Am. Const. Law, 759; *Janesville v. Carpenter*, 77 Wis. 288; *Pumpelly v. Green Bay Co.* 13 Wall. 166; *Hutton v. Camden*, 39 N. J. Law, 123, 23 Am. Rep. 203. Ch. 301, Laws of 1885, properly construed, would not allow the state to be made a party defendant except to litigate its own rights. By ch. 74, Laws of 1889, all the rights acquired by the state have inured to its grantees and it has no further interest in the matter. *United States v. San Jacinto Tin Co.* 125 U. S. 273. Having no real interest in the matter it could only join in the right of the original defendant, and if he has lost his right the defense must fail. *United States v. Beebe*, 127 U. S. 338; *Curtner v. U. S.* 149 id. 662. If the

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state is but a nominal party, the original party can gain by its presence no greater rights than it would otherwise have had. Ch. 301, Laws of 1885, is invalid in so far as it attempts to bind the original owner by the record of the void tax deeds, and consequently it is so in that part which allows the state to be made a party, which is clearly dependent thereon. *Warren v. Charlestown*, 2 Gray, 84; *Comm. v. Clapp*, 5 id. 97; *Comm. v. Pomeroy*, id. 486; *Slauson v. Racine*, 13 Wis. 398.

For the respondents there was a brief by *Silverthorn, Hurley, Ryan & Jones*, attorneys for *McMillan*, and the *Attorney General*, for the state, and oral argument by *T. C. Ryan* and *W. C. Silverthorn*

MARSHALL, J. There are several questions presented on this appeal proper for consideration, some necessary and some not. This opinion will not be confined strictly to those necessary.

1. It is contended on the part of the appellant that ch. 278, Laws of 1883, for failure to comply with which the trial court decided that the action was prematurely brought and should be abated, is unconstitutional and void under art. I, sec. 9, which provides that "every person is entitled to a certain remedy in the laws, for all injuries or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws." A large number of decisions are brought to our attention from other states to show that statutes there which require the payment of illegal taxes as a condition precedent to the right to institute an action to avoid taxes, or tax deeds based thereon, offend against this constitutional safeguard; but such adjudications do not apply here. The act in question does not require the former owner of lands, as a condition for bringing an action

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to void an illegal tax deed based thereon, to part absolutely with anything, but only as an earnest of good faith that he will finally abide by the decision of the court respecting the payment of legal taxes that may be determined to be equitably chargeable to the lands requires the deposit mentioned in the act. The essential principle involved has been repeatedly challenged in this court, and as often sustained. *Flanders v. Merrimack*, 48 Wis. 567; *Wakeley v. Nicholas*, 16 Wis. 588; *Smith v. Smith*, 19 Wis. 615; *Finney v. Ackerman*, 21 Wis. 268; *Knight v. Barnes*, 25 Wis. 352; *Philleo v. Hiles*, 42 Wis. 527. In both legal and equitable actions, legislation requiring a deposit of taxes, void simply on the ground of irregularities, but not inequitable, as a condition of recovery, has been sustained, as the cases referred to abundantly show. In *Lombard v. Antioch College*, 60 Wis. 459, the act in question was challenged, the contention being made, now pressed upon the attention of the court,—i. e. that the requirement to deposit taxes equitably chargeable to land as a condition of recovery in an action to avoid a tax deed based thereon cannot be extended so as to require the deposit of taxes on lands paid by the tax-title claimant as a condition precedent to the right of the former owner to institute an action to avoid such tax or a deed based thereon; and in respect thereto this court decided, in effect, that ch. 278, Laws of 1883, cannot be held unconstitutional because it requires the plaintiff to deposit the taxes which have been paid on the lands by the party claiming the same as a condition of his right to maintain an action to avoid a tax title based thereon, under which the party claims who has paid such taxes, without substantially overruling the decisions of this court holding that such deposit may be required after the action has been brought, as a condition of recovery, and that, the court having settled the question that the former owner who brings an equitable action to avoid a tax deed for mere irregularities in tax proceedings must tender

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or offer to pay the taxes properly due upon the land, on account of which the tax deed was issued, as a condition of recovery, there can be no doubt as to the power of the legislature to apply such equitable rule, as a condition of the right of a party to avail himself of his legal right of action, to accomplish the same object sought by the equitable action. We do not perceive how it can seriously be contended but that the very question here presented was passed upon in *Lombard v. Antioch College*, and determined against appellant's contention. No new light is shed on the question by the briefs of counsel or the study which we have been able to give to the subject.

2. It is further contended by the appellant that the deposit required by the act of 1883, being a mere condition precedent to the institution of the action, a failure to comply therewith could only be taken advantage of by plea in abatement, and that defendant *McMillan* waived such condition by failure to tender such plea. Respondents insist that failure to make the deposit was not a matter in abatement, but in bar; therefore, that *McMillan* could insist upon such condition under his general denial.

The distinction between a plea in abatement and a plea in bar is that the latter goes to the merits, and, if in accordance with the facts, shows that the plaintiff cannot maintain the action at any time, while the former sets up matter only tending to suspend the suit for the time being, without preventing the recommencement of the same at some future time when the facts relied upon for such suspension no longer exist. Chitty, Pl. (16th Am. ed.), 462. The mere statement of the distinguishing characteristic between a plea in abatement and a plea in bar sufficiently shows that the matter in controversy was in abatement, strictly so called. It did not go to the cause of action at all, but only fixed terms upon which the remedy to enforce the cause of action could be made available. This was not the mere premature bring-

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ing of an action which may be taken advantage of either by plea in abatement or by motion for a nonsuit, where the defect does not appear upon the face of the complaint, under the rule referred to in *Millett v. Hayford*, 1 Wis. 401, citing 1 Chitty, Pl. 453. Such rule applies only where the matter is such that it goes to the cause of action or to the jurisdiction of the court; then it may be pleaded either in bar or in abatement, or taken advantage of by motion for a nonsuit. *Benthall v. Hildreth*, 2 Gray, 288; *Nat. Bank v. Stanton*, 116 Mass. 435; *Franklin Springs Institution v. Reed*, 125 Mass. 365. But where the cause of action is complete, though something is yet to be done as a condition of the right to enforce such cause of action, the nonperformance of such condition is held to be a matter to be taken advantage of by abatement only, and must, therefore, be pleaded specially, or it is waived. Failure to keep in mind this distinction between matter in abatement only and matter which may be taken advantage of either in abatement, or in bar, or by way of motion for a nonsuit, is likely to lead one astray, for, without such distinction, there is an apparent conflict in the authorities respecting how the objection must be raised. For instance, the general doctrine will be found laid down in 1 Ency. of Pl. & Pr. 22, to the effect that the objection that the action is prematurely brought must be raised by plea in abatement unless taken by demurrer (citing *Collette v. Weed*, 68 Wis. 428), while the text cited from Chitty, the Massachusetts cases in support of the same, and the early case of *Millett v. Hayford*, *supra*, in this court, to which may be added *Noonan v. Bradley*, 9 Wall. 394, state apparently a contrary doctrine, but all are in harmony when the distinction is kept in mind between matter going to the jurisdiction of the court or to the cause of action itself, and matter affecting the remedy by way of qualification or otherwise.

There does not appear to have been any very decided ex-

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pression of opinion on the question in this court in the earlier cases. In *Jaquish v. Ithaca*, 36 Wis. 108, the action was brought against a town without having first presented the claim to the town board of audit. The statute provided for such presentation as a condition precedent to the institution of the action. Failure to comply with such condition did not appear upon the face of the complaint, and was not pleaded in abatement. In discussing the subject Mr. Justice LYON said: It only goes in abatement of the action, and should have been made *on the trial, by a motion for a nonsuit or in some other proper way.* "Indeed, *it may well be argued that this matter in abatement should have been pleaded*," — citing Gould, Pl. ch. 5, § 153, to the effect that all matters in abatement, if not pleaded, are waived. But in *Sheel v. Appleton*, 49 Wis. 125, the charter of the city required, as a condition precedent to the bringing of an action upon any claim against such city, the presentation of such claim to the common council for allowance. The action was brought without reference to such provision. No objection was taken by demurrer or plea in abatement, and this court said that the statute prescribing the conditions upon which the action might be brought went only to the capacity of plaintiff to sue, not to the jurisdiction of the court or the cause of action; hence the objection could only be taken by plea in abatement. This was followed by *Collette v. Weed, supra.* In *Hendy v. Soule* (Dist. of Cal.), Deady, 400, the precise question was decided in a similar case. The action was to recover taxes, paid to the revenue collector, alleged to be illegal. The United States statute governing the subject (sec. 19, Act of July 13, 1866, ch. 184), provided as follows: "No suit shall be maintained in any court for the recovery of any tax alleged to have been erroneously or illegally assessed or collected, until appeal shall have been duly made to the commissioner of internal revenue." The action was brought without reference to

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such statute. No objection was taken by plea in abatement, or by demurrer. The court, by DEADY, J., said, in effect, that such statute does not limit the jurisdiction of the court, but qualifies the right of plaintiff to maintain his action. The right of action exists independent of the statute, and the objection that the prescribed condition was not performed, which qualifies the remedy by suit to recover the tax wrongfully collected, could only be taken advantage of by plea in abatement.

From the foregoing we conclude that the condition prescribed by ch. 278, Laws of 1883, precedent to the commencement of a suit by the former owner of lands, to avoid a tax deed thereon, did not affect an existing cause of action to void such deed, or go to the jurisdiction of the court to entertain such cause of action, but qualified or restrained an existing right to the remedy to enforce such cause of action; hence, the nonperformance of such condition could only be taken advantage of by demurrer, if such failure appeared upon the face of the complaint, and, if not, as in this case, by plea in abatement. No such plea having been interposed by defendant *McMillan*, the benefit of such statutory restraint upon the remedy was effectually waived and lost for all the purposes of the action unless in effect restored by the bringing in of the state as a defendant.

3. The next important question is, Was the state properly brought in as a defendant and permitted to plead, in abatement of the action, nonperformance of the condition precedent to the institution or maintenance thereof prescribed by the act of 1883? The state conveyed these lands, and received its grantee's money therefor. Its conveyance purported to pass the title to such grantee. It was under some obligation, the nature of which it is not necessary here to determine, to make such title good or refund the money paid therefor. As the learned circuit judge said, it was also interested in enforcing collection of the public revenues.

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These conditions, obviously, in the judgment of the legislature, were sufficient to warrant the passing of the act of 1885, authorizing the state to be made a party for the purpose of protecting the interests of the person claiming title under its conveyance, and in that way of protecting its own interests. We fail to see wherein such act contravenes any constitutional right of the plaintiff. He failed to comply with the conditions of the act of 1883, after the passage of the act of 1885, before the plea in abatement was filed by the state. That was a matter of his own choosing. The act expressly provides for making the state a party defendant in actions pending at the time of its passage, and obviously to subserve the purposes of the law, heretofore stated. Now, to say that it was error to allow the state to come in, pursuant to such act, and interpose the plea in abatement, is, in effect, to nullify such act. We find nothing in ch. 74, Laws of 1889, to change the relation of the state to the subject in this action. It provided that all titles obtained by the state, pursuant to the law of 1885, to lands circumstanced as those here in suit, should vest in the grantees of the state or those claiming under such grantees. The purpose of the deed taken under the act of 1885 being obviously, as before stated, to strengthen the title of the grantees of the state so far as relates to lands theretofore sold, its interest in maintaining the title of such grantees was just the same after the act of 1889 as before. No reason is perceived why such act can cut any figure in the matter.

It follows, from the foregoing, that the state was properly made a party defendant, that its plea of abatement was properly sustained by the trial court, and that the judgment in abatement of the action was properly rendered.

By the Court.— The judgment of the circuit court is affirmed.

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DANIELS, Appellant, vs. SMITH, Administrator, Respondent.

March 22 — April 7, 1897.

Appeal: Finding sustained.

Upon appeal from a judgment of the circuit court disallowing claims against an estate, if the findings of the court are fairly supported by the evidence such judgment will be affirmed where, though the evidence on the part of the claimant is not specifically contradicted by any witness, it is rendered inherently improbable by other evidence.

APPEAL from a judgment of the circuit court for Marathon county: CHAS. V. BARDEEN, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *John Livermore*, attorney, and *Bump, Kreutzer & Rosenberry* and *C. F. Eldred*, of counsel, and oral argument by *Mr. Eldred.*

For the respondent there were separate briefs by *Brown & Pradt*, attorneys, and *Silverthorn, Hurley, Ryan & Jones*, of counsel, and oral argument by *Neal Brown.*

WINSLOW, J. The appellant filed two claims against the estate of his deceased brother, Morgan G. Daniels, one for $10,271.21, claimed to be due upon an account stated, and one for $600.61, claimed to be due upon open account. Upon trial in the county court, the first claim was disallowed, and, on the second, $480.16 was allowed. Upon appeal to the circuit court, the action was tried by the court, and findings were made to the effect that neither claim was proven to be just, and both were disallowed.

The appellant claims that these findings are against the clear preponderance of the evidence. We have examined the evidence and the opinion of the trial judge, and we think the evidence fairly supports the findings. While it is true that there is evidence on the part of the claimant which is not specifically contradicted by any witness, it is also true

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that there are many facts in evidence rendering the evidence of these witnesses inherently improbable and incredible. Such facts may undoubtedly be controlling, even in the absence of specific denial or contradiction. They were so regarded by the trial judge in the case, and apparently with good reason.

By the Court.— Judgment affirmed.

McMAHON, Respondent, vs. EAU CLAIRE WATER WORKS COMPANY, Appellant.

March 23 — April 7, 1897.

Damages: Cross-examination: Remarks by court: Waiver of written charge.

1. In an action for a personal injury caused by negligence, a verdict for $5,000 damages is *held* not excessive, where there was evidence that the plaintiff was suffering from paresis as a result of the injury.
2. Parties should be liberally indulged in the exercise of the right to cross-examine witnesses, so long as anything of value is likely to be brought out; but the court has a large discretion in the matter, and its exercise thereof to shut out unnecessary and useless questions will not be *held* error, where no substantial rights of the appellant appear to have been prejudiced thereby.
3. A judgment will not be disturbed because of remarks made by the court to counsel, during the trial, relative to his mode of cross-examining witnesses or the unnecessary repetition of questions, where it does not affirmatively appear that the appellant was prejudiced thereby.
4. If, when a jury returns into court for further instructions, the stenographer is absent, but one of defendant's counsel is present, and he keeps silent when the court remarks that instructions cannot be given in the absence of the stenographer without the consent of parties, his silence must be deemed to be consent, and a waiver of the necessity of a written charge.

APPEAL from a judgment of the circuit court for Eau Claire county: W. F. BAILEY, Circuit Judge. *Affirmed.*

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The defendant owned a system of waterworks in the city of Eau Claire, with the usual system of pipes along the city streets. At one place in the street called Galloway street the Eau Claire river, at a time of freshet, had washed out a part of the street and uncovered the defendant's water pipe. While the defendant was repairing and relaying its pipes, and before it had completely filled the gully made by the freshet and the excavations made for relaying its pipe, a fire occurred in the nighttime. The plaintiff was a fireman. He rode to the fire on the hose cart, as was the usual means of getting to fires. While being driven rapidly along Galloway street, towards the fire, the horses stumbled in the sand thrown up in making the excavation. The plaintiff was thrown off the hose cart, and against the side of the excavation, and injured. The negligence claimed was the failure to place sufficient barriers about the excavation to warn persons upon the street and prevent approach to it. There was a general verdict for the plaintiff for $5,000. A motion for a new trial was overruled, and judgment given for the plaintiff upon the verdict, from which the defendant appeals.

H. H. Hayden, for the appellant.

T. F. Frawley, for the respondent.

NEWMAN, J. Six alleged errors are discussed in the appellant's brief,— one relating to the amount of damages found by the verdict; five relating to matters of practice arising upon the trial.

1. Are the damages excessive? The damages assessed by the jury are large, disproportionate to the apparent seriousness of the injury. Yet there is much testimony of physicians tending to show that the real injury is much more serious than is apparent by simple observation. Such testimony tends to show that the plaintiff's injuries are to the nervous system, to the brain and spinal cord; that they have

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caused paresis or progressive paralysis, which is incurable. It is impossible, under this evidence, to say that the damages are excessive.

2. Was it error to forbid further cross-examination of the plaintiff? The right of cross-examination is an important one. It may aid greatly in eliciting the truth, and in giving proper estimation of the weight and value of testimony. It should be indulged by the court liberally, so long as it seems to promise to lead to the discovery of truth or the elucidation of the matter under investigation. But it is a right which is liable to be abused, either through the overzeal of the cross-examiner or the natural excitement of the trial. So it must be subject to the control and discretion of the trial judge. When the indulgence of counsel in profitless cross-examination goes so far as to become an obstruction to the further progress of the trial, it may become necessary for the trial court to intervene in order to prevent the frustration of the trial. A large measure of discretion must be permitted to the trial judge in this behalf, else the time of the court may be squandered, and the rights of litigants frittered away, by vain repetitions and irrelevant investigations. The particular matter on which the counsel was pressing the witness when the court intervened was the question: "How far from the edge of the ditch was the front wheel,—the north front wheel?" The witness had explained that, owing to the darkness and the confusion and the pain of his injury, he had taken little notice of the situation. He answered the question: "I don't know." It was immediately followed by this: "According to your best recollection, how far was it?" The court then intervened with a remark to the effect that it was too unimportant to spend time upon every trivial detail, especially as the witness had already explained that he had no clear recollection of the matter. The counsel excepted to the remark of the court, and proceeded with the cross-examination. It is not evi-

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dent that counsel was denied the privilege of any cross-examination which had a reasonable promise of benefit to his client. The matter out of which the incident arose was of little relevance and trifling importance, and its pursuit promised nothing of value. It was no error.

3. Were the remarks addressed to counsel by the court error? The court, several times during the trial, addressed to the counsel impatient and caustic remarks, in criticism of his method of the cross-examination of witnesses, and the waste of time produced by it. After the witness James Looby, who was the driver of the hose cart on the occasion of the accident, had been examined in chief, and before the commencement of his cross-examination, the judge said to the defendant's counsel, "All you can go into with this witness on cross-examination is as to the manner in which he drove;" and during the cross-examination said to defendant's counsel: "I will not allow you to take advantage, and make the plaintiff's witness your witness; when your turn comes you may call him." And during the cross-examination the court said to defendant's counsel: "It doesn't seem to me we ought to take up the time with these questions which are mathematically determined. You have your map here. It has been measured, and the mere estimate of a witness that hasn't measured it will go for naught when you demonstrate it to a mathematical certainty. I wouldn't take up the time, but he may answer." And at another time during the cross-examination the court stated to defendant's counsel, referring to the cross-examination: "Now, I guess we will shut off. I want to tell you, life is too short. Simply because the court has ruled against you on this question, if you seek to prolong it and annoy the court and take up time, you won't make any progress. I refuse to allow the cross-examination to proceed any further." Defendant's counsel then stated: "We desire to examine him on the depth of the ditch at the place where plaintiff was first seen

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by the witness." By the court: "He has stated that." By defendant's counsel: "I do not think he has." By the court: "Well, if he has not, I will exclude it now." Defendant's counsel then took an exception, and the court stated: "I am going to stop these long, useless cross-examinations." Defendant's counsel took an exception to such remark, and the court then further stated: "Mr. Hayden, as I have told you before, if you had more discretion and less assurance you would get better results,"—to which remark defendant's counsel took exception. And during the cross-examination of the plaintiff the defendant's counsel asked plaintiff in regard to the relative situation of the hose cart with the ditch, and the court stated to defendant's counsel: "I don't want to be constantly ruling upon these matters; but it is absolutely unimportant to spend fifteen or twenty minutes upon every little technical detail of that transaction that does not bear upon the main question. It is taking up unnecessary time, and I don't think it accomplishes any good purpose. The witness has already told you that he has no distinct recollection upon the question. What is the use of asking him any further about it? That precludes any further questioning. If he has no distinct recollection, if he should make a statement under the pressure of cross-examination, that it was probably such a distance, the testimony would not amount to anything,"—which remarks were excepted to by the defendant.

It is claimed that these remarks, under the circumstances in which they were made, were prejudicial to the defendant's case and were error. It would, perhaps, be asking too much of human nature to expect the trial judge to be always equable and bland under the irritating infliction of long drawn out cross-examinations upon trivial details, with unending iteration, especially when the judge feels that it is, in part, for the purpose to "annoy the court and to take up time." One who has not endured such inflictions will scarcely

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appreciate the exasperation of it. No doubt this feeling may be produced by a cross-examination conducted in entire good faith, but with too little wise discretion. Somewhat must be conceded to the trial judge if his remarks are a little fervid and tinged with some slight modicum of sarcasm. It is not impossible that these remarks of the judge may have had an influence prejudicial to the defendant's case. But the burden is on the party who alleges error to establish it clearly. Evidently the remarks were not entirely unprovoked. It cannot be known, here, how much of such prejudice as may have been excited was due to the indiscreet conduct of counsel. The judgment cannot be disturbed on this ground.

4. The jury returned to the court room for further instructions, which were given orally, in the absence of the stenographer and of the defendant's leading counsel. One of the defendant's attorneys, however, was present. The court remarked that instructions could not be given in the absence of the stenographer without the consent of the parties. Defendant's attorney was silent. No doubt, in such circumstances, such silence should be deemed to be consent. It was a mere matter of practice. Consent waived the necessity for a written charge.

5. The court intervened about the cross-examination of the witness Looby. Perhaps what has been already said sufficiently exhibits the force of this exception. The cross-examination seems to have been needlessly and exasperatingly attenuated and long drawn out. The court might well enforce the rule which confines the cross-examination to matters shown in the examination in chief.

6. The plaintiff, as a witness, was permitted to testify that all the statements which he had made to his physicians were true, under objection. The subject was pursued no further. It was not shown, nor attempted to be, what statements he had made to the physicians. Nor did they testify to sub-

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jective symptoms. If error, it was harmless error. No error is found which requires a reversal of the judgment.

By the Court.— The judgment of the circuit court is affirmed.

LEONARD, Respondent, vs. WHITCOMB and another, Receivers, Appellants.

March 23 — April 7, 1897.

Carriers of live stock: Liability for defective cars.

It is the absolute duty of a railroad company as a carrier of live stock to furnish cars which are suitable therefor, on reasonable notice from a shipper. If a car is furnished which is unsuitable, having defects which are not obvious nor such as an ordinary person would be likely to discover by inspection, yet which would be discovered by a reasonably careful inspection by an experienced person, the carrier will not be relieved from liability for an injury to an animal shipped in such car, arising from its defects and the failure of the carrier to exercise ordinary care in respect to its suitableness, by the fact that the shipper examined and accepted such car, unless he did so with full knowledge of its defects; nor will an agreement by the shipper to assume the risk of such an animal injuring itself during the shipment, caused by a want of ordinary care on the part of the carrier, and also all risk of insecurity in the floor of the car, relieve the carrier, such a contract being void.

APPEAL from a judgment of the circuit court for Eau Claire county: W. F. BAILEY, Circuit Judge. *Affirmed.*

This was an action to recover damages for injuries to a horse shipped over defendants' road. Plaintiff applied to defendants' station agent for a car in which to transport his horses from Portage to Glidden, this state. Such agent designated a car for such purpose. Just what took place between the plaintiff and the agent respecting the car does not definitely appear, but the evidence tends to show that

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the former was requested to examine the car, and see if it was safe for his purpose, and that thereupon he made an examination, to see if there were any holes in the floor, or projecting nails, and to see that the doors were secure, and that, not observing any defects in that regard, he accepted the car, and placed his stock therein. In the course of the shipment, one of the horses broke through the floor and was injured. It was claimed by plaintiff that such breaking happened by reason of the floor being defective, and on defendants' part it was claimed that such breaking was caused by the viciousness of the animal. It was also claimed as a defense that the shipment was made under a written contract, by which, among other things, it was agreed that, in consideration of reduced rates, plaintiff should assume the risk of the horse injuring himself during the shipment, caused by want of ordinary care on defendants' part; also, that it contained an agreement that plaintiff would, among other things, assume all risk of insecurity in the floor of the car. The jury found in favor of the plaintiff, and assessed his damages at $100. Judgment was rendered accordingly, and, such proceedings having been duly taken before judgment as were necessary to preserve defendants' exceptions for review, this appeal was taken from such judgment.

For the appellants there was a brief by *Howard Morris* and *Thomas H. Gill*, and oral argument by *Mr. Gill*. They argued that the plaintiff was bound by his contract by which he took on himself the risk of inspection, and released the defendants from all damages except for gross negligence or wilfulness. Such contracts are valid. *Abrams v. M., L. S. & W. R. Co.* 87 Wis. 485; *Ill. Cent. R. Co. v. Hall*, 58 Ill. 409; *Harris v. N. J. R. Co.* 20 N. Y. 232; *Chicago & N. W. R. Co. v. Van Dresar*, 22 Wis. 512; *Wilson v. N. Y. C. & H. R. R. Co.* 27 Hun, 149; *East Tenn., V. & G. R. Co. v. Johnston*, 75 Ala. 596. The plaintiff was guilty of contributory negligence in not taking precautions against

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dangers arising from sharp calks on such a heavy, nervous, uneasy horse. *Evans v. Fitchburg R. Co.* 111 Mass. 142.

C. T. Bundy, for the respondent, to the point that the carrier could not by contract avoid liability for a loss occasioned by its negligence or failure to perform duties incident to its employment, cited *Welsh v. P., Ft. W. & C. R. Co.* 10 Ohio St. 65; *Railroad Co. v. Lockwood*, 17 Wall. 377; *Abrams v. M., L. S. & W. R. Co.* 87 Wis. 485.

MARSHALL, J. The court admitted evidence respecting the inspection which plaintiff made of the car before loading. This was objected to by defendants' counsel, on the ground that the written contract required plaintiff to inspect the car, and to assume the risk of defects in the floor, if there were any. This involves the question, whether the stipulation by which the plaintiff, in form, assumed the risk of defects in the car, is valid and binding upon him. There is some conflict of authority, more apparent than real, respecting the validity of such stipulations; but the real principle involved has been settled in this court, and is not open to review. Railroads are common carriers of live stock, with the attendant common-law duties and liabilities respecting carriage of property generally by such carriers, subject to some restrictions and liabilities arising out of the instincts, habits, propensities, wants, necessities, vices, or locomotion of the animals. *Ayres v. C. & N. W. R. Co.* 71 Wis. 372; *Abrams v. M., L. S. & W. R. Co.* 87 Wis. 485. Such duties and responsibilities require railroad companies to furnish suitable cars for the transportation of live stock on reasonable notice so to do, and render such companies responsible for damages for negligence in that regard. Contracts exempting such companies from the consequences of such negligence are void. *Abrams v. M., L. S. & W. R. Co., supra; Loeser v. C., M. & St. P. R. Co.* 94 Wis. 571.

Why the stipulation in the written contract in question, re-

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quiring plaintiff to examine the car, and assume the risk of its suitableness, does not come within the condemnation of the foregoing, is not perceived. Numerous authorities are cited by counsel for defendants to support the contention that a shipper may assume the responsibility of the suitableness of a car furnished for his use, but a careful examination of the same shows that they are not applicable to the facts of this case. *Ill. Cent. R. Co. v. Hall*, 58 Ill. 409, was a case where the shipper refused to use the defendant's car and furnished one belonging to another road. The exemption from liability was placed on the ground that the defendant did not furnish the car, or agree to, but only to haul it over the road; hence the defect complained of was not one contracted against by the company. In *Squire v. N. Y. C. R. Co.* 98 Mass. 239, damages from suffocation and overloading were stipulated against; and the court held the stipulation valid, the fact being that the plaintiff's agent caused the stock to be loaded as they were, and observed the overloading and want of proper ventilation of the car before the transit commenced, and, in effect, agreed to have such transit commence and continue nevertheless. In *East Tenn., V. & G. R. Co. v. Johnston*, 75 Ala. 596, the stipulation was against damages from dangers known to and acquiesced in by the shipper, that had nothing to do with the suitableness of the car or the management of it. The court in effect held that the duty to furnish suitable cars was absolute, and that contracts limiting the common-law responsibilities for loss or injury caused by the carrier, or by its own negligence, are void. To the same effect are *Mitchell v. Ga. R. Co.* 68 Ga. 644, and *Harris v. N. I. R. Co.* 20 N. Y. 232. In the latter case the shipper selected the car. Nevertheless, the defendant was held liable, the evidence not showing that the shipper had actual notice of the defects that caused the injury. The court held, in effect, that the defendant was responsible for the suitableness of the car, and that it was the duty of its

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agent to examine the car, and to call the shipper's attention to all defects which a reasonably careful inspection by a competent person in that line of work would disclose; that, unless such defects were open and obvious, a failure of the agent so to do was the failure of the company, and constituted actionable negligence, for which a recovery could be had, notwithstanding the inspection and acceptance of the car by the plaintiff. Numerous other cases may be cited to the same effect. They are in entire harmony with *Galveston, H. & S. A. R. Co. v. Silegman* (Tex. Civ. App.), 23 S. W. Rep. 298; *Gulf, C. & S. F. R. Co. v. Trawick*, 80 Tex. 270; and *Hunt v. Nutt* (Tex. Civ. App.), 27 S. W. Rep. 1031, which distinctly hold that a railway company cannot by contract avoid the consequences of its negligence, and cannot release itself from the responsibility of furnishing suitable cars, by stipulating that the risks of defects shall be assumed by the shipper.

From the foregoing we deduce the following: It is the duty of a railroad company, as a common carrier of live stock, to furnish suitable cars therefor, on reasonable notice so to do from a person desiring to transport such stock over its road; that this duty is absolute, and a contract exempting it from liability for damages arising from unsuitableness of cars so furnished, attributable to a failure on its part to exercise ordinary care, is void; that if a car be furnished having defects rendering it unsuitable, which defects are not obvious or such as may be presumed that an inspection by an ordinary person will bring to his knowledge, and yet are such that a reasonably careful inspection by a person experienced in such business will lead to their discovery, an inspection and acceptance of the car by the shipper will not save the carrier harmless from damages caused by such defects, unless it be shown that they were actually pointed out to the shipper, and that he accepted the car with full knowledge of their existence.

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The foregoing conclusion renders it unnecessary to consider other questions presented on the appeal. They fall with the contention that plaintiff was bound by his acceptance of the car, pursuant to the contract of carriage. The jury found, under proper instructions, that the car was unsuitable, and that a reasonably careful examination of the same would have brought the defects to the attention of the company. Such defects were not obvious or of such a character that they would ordinarily be discovered by an inspection by an inexperienced person. The station agent was the instrumentality selected by the company to designate the car for plaintiff's use; hence it was his duty to see that it was suitable for such use. The charge of the learned circuit judge, to the effect that it was the duty of the agent to inspect the car, and to discover all the defects which a proper inspection would disclose, and that his neglect so to do was the negligence of the company, was proper.

No other question presented by the appeal appears to require special notice.

By the Court.— The judgment of the circuit court is affirmed.

GEILFUSS, Assignee, Respondent, vs. CORRIGAN and another, imp., Appellants.

December 16, 1896 — April 30, 1897.

Sale of chattels: "Warehouse receipts:" Constructive possession: Fraudulent conveyances: Pledges: Judgment note: Fraud.

1. In order to render storage warrants "warehouse receipts" so that title to and constructive possession of the property covered thereby would pass by their transfer and indorsement, they must have been issued by a warehouseman or one openly engaged in the business of storing property for others for a compensation; and the mere fact that a corporation engaged in smelting ore issued such war-

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rants on iron in its yard did not constitute it a warehousing corporation.

2. Good faith on the part of a pledgee does not render the pledge valid, in the absence of delivery of the possession, either actual or constructive.

3. A furnace corporation engaged in smelting iron ore gave a mining corporation receipts in the form of "storage warrants" on iron stored in its yard in order to raise money without injuring its credit. Both corporations were under the absolute ownership and control of the same person. There was no consideration for the transfer, and no other delivery of the property than the turning over of the warrants, and it was understood that they should be returned whenever the furnace company needed them on account of sales of iron. No specific iron was ever set apart as covered by the warrants, but other iron was piled in the yard as it was manufactured and shipments made therefrom indiscriminately. *Held*, that the mining company acquired no title to the iron as against creditors of the furnace company.

4. A bank which received such storage warrants in good faith from the mining company as collateral, but which never had any other possession of the iron than that given by the transfer of the warrants and never notified the furnace company of its claim thereto, but permitted the latter to dispose of the iron on hand and substitute other iron in its place,—acquired no lien on the iron as pledgee as against third persons, even conceding that the title thereto passed to the mining company.

5. The fact that a judgment note was obtained for the purpose of entering judgment and levying execution on the property of the debtor does not render the note fraudulent.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Reversed.*

This is an action to recover the value of 10,800 tons of pig iron levied on by the sheriff of Mercer county, Pennsylvania, on the 19th day of July, 1893, upon an execution issued out of the court of common pleas of Mercer county, Pennsylvania, upon a judgment in favor of Price McKinney, receiver of Corrigan, Ives & Co., for $178,908, against the Douglas Furnace Company, a corporation under the laws of the state of Illinois. The title of the iron is the question in

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controversy in this case. The plaintiff, as assignee of the bank, claims a right in this iron, as pledgee of the Buffalo Mining Company, a Wisconsin corporation, and of Ferdinand Schlesinger, to secure certain loans made by the bank to the Buffalo Mining Company and to Schlesinger. The defendants, who are members of the firm of Corrigan, Ives & Co., justified the seizure and subsequent sale of the iron under the said execution against the Douglas Furnace Company, on the ground that the attempted transfer or pledge of the same was fraudulent and void as against creditors of the Douglas Furnace Company.

The action was tried by the court, without jury, and the facts developed upon the trial were substantially as follows:

In the year 1893 the Buffalo Mining Company was a mining corporation, engaged in mining iron ore in the northern peninsula of Michigan, and was a lessee of the Buffalo Mine and a number of others. At the same time, the Douglas Furnace Company was an Illinois corporation, engaged in smelting iron ore and manufacturing pig iron in Mercer county, Pennsylvania, where it owned three furnaces near Sharpsville and Sharon, in said county, which furnaces were known as the Sharpsville, Douglas, and Sharon Furnaces, respectively. For some time prior to the year 1893, and up to the 7th day of July in that year, the defendants *Corrigan* and *Burke*, with one Franklin T. Ives (who was not served on, and did not appear in this action), were copartners, doing business at Cleveland, Ohio, under the firm name of Corrigan, Ives & Co., and were engaged in the business of selling iron ore and making advances thereon for a commission as factors. Both of the corporations were under the absolute control of Ferdinand Schlesinger, who owned all, or nearly all, of the stock in each corporation. Schlesinger's business was conducted at the city of Milwaukee. One Max Hirschfeld was the president of the Douglas Furnace Company, and there seems to have been nominally a

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board of directors of that corporation. Hirschfeld's place of business was at Sharpsville, Pennsylvania, and he was the active manager of the furnace company's business, acting entirely under the direction of Mr. Schlesinger. The office of the Buffalo Mining Company seems to have been at Milwaukee, and this corporation also, while it nominally had officers, was absolutely under the control of Mr. Schlesinger, and its officers did his bidding.

In the early part of the year 1893, both of the corporations were doing a large business in their respective fields, and so was the firm of Corrigan, Ives & Co. In February, 1893, a contract was made by the Buffalo Mining Company with Corrigan, Ives & Co., whereby the latter firm made advances to the Buffalo Mining Company, and chartered vessels for the transportation of its ore, and handled the ore output of the Buffalo Mining Company, as factors upon commission. They were also to collect the proceeds of sales of ore which, when collected, were to be applied in payment of advances made to the mining company under this contract. Between February 1, and about the 1st of July, 1893, Corrigan, Ives & Co. had received and handled from the Buffalo Mining Company ore amounting in value to between $200,000 and $300,000, and had made advances thereon to the Buffalo Mining Company amounting to about $200,000. It appears that Corrigan, Ives & Co. did not know, prior to the month of June, 1893, of the relationship of Schlesinger to the Douglas Furnace Company. Between January 1 and July 18, 1893, Corrigan, Ives & Co. sold and delivered to said Douglas Furnace Company large quantities of iron ore, nearly all of which came from the Buffalo Mining Company, upon which there was a balance owing on the 18th of July, 1893, of $178,908.85, part of which had matured, and part had not then matured. During the time from January to July, 1893, the Douglas Furnace Company was actively engaged in smelting iron ore, and making pig iron, and selling

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the same from its furnaces and yards in Pennsylvania, such pig iron being nearly all made from the ore of the Buffalo Mining Company sold to the furnace company by Corrigan, Ives & Co. During the aforesaid time some 70,000 tons of pig iron were manufactured by the furnace company, and, on the 18th of July aforesaid, there were left on hand in its yards 22,000 tons of such pig iron. On this 18th day of July, 1893, therefore, Corrigan, Ives & Co. had made advances upon ore to the Buffalo Mining Company of about $200,000; the Douglas Furnace Company was indebted to Corrigan, Ives & Co. in the sum of more than $178,000, as the purchase price of ore sold to it; and at the same time the Douglas Furnace Company had in its yards 22,000 tons of pig iron manufactured from the ore which had been sold to it by Corrigan, Ives & Co.

In January, 1893, Mr. Schlesinger became desirous of borrowing money for his various enterprises of the banks in the city of Milwaukee, by means of so-called storage warrants upon the pig iron which was accumulating in the furnace yards at Sharpsville. On the 21st of January, he addressed a letter to Mr. Hirschfeld, at Sharpsville, as follows: "I see that quite an amount of pig iron is accumulating. What do you think of taking out some storage warrants against such iron, or could you, without taking out storage warrants, borrow some money on the pig iron in the yards? Please let me know your suggestion about it, and it would be very desirable if you could have the pig iron turned into money right along." Mr. Hirschfeld replied by letter on the 25th of January, in which he said that the only way of borrowing money on pig iron would be by taking out storage warrants through the medium of a storage company, but that such a course would be expensive, and would require a sublease of the iron yards, and that as he did not need any large amount of money before the middle of February, he would have time to look the matter up and make a report.

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About the 1st of February, 1893, Mr. Hirschfeld was in Milwaukee, and had a personal consultation with Mr. Schlesinger on the subject of issuing storage warrants, and Mr. Hirschfeld then explained to Mr. Schlesinger that it was very expensive to have storage warrants issued by a storage company; that they charge so much a month for each ton of pig iron covered by the warrants. Mr. Schlesinger then said: "I do not think we need a storage company. I think we can issue our own warrants," — and he told Hirschfeld he would get some warrants printed, and send them down to Sharpsville, and he (Hirschfeld) could fill them out as he (Schlesinger) would write for them. Mr. Schlesinger then had fifteen formal storage warrants written out in the office by a typewriter, and Mr. Hirschfeld signed them, as president of the Douglas Furnace Company. Just how many tons of pig iron were represented in these fifteen warrants does not definitely appear. The following was the form of the warrants:

Warrant.

Number ——. Amount received, —— tons. Less loss in weight from handling by scale, rust, or sand, if any, not to exceed —— tons.

Douglas Furnace Company, Sharpsville, Mercer Co., Pa., hereby acknowledge to have received —— tons of pig iron, and will deliver the same, less loss in weight from handling by scale, rust, or sand, if any, not to exceed —— tons, to the order of Buffalo Mining Company, at its yards at Sharpsville, Pa., upon payment of storage and charges, and the surrender of this warrant properly indorsed.

Memorandum.

Charges from 189–, viz.: Labor included, —— cts. per ton. Storage, per month, —— cts. per ton. If reweighed when delivered, —— cts. per ton. Storage charges named above payable every six months from date. If not paid, interest will be charged. Reported brand ——, said to be ——, record book page ——. Sharpsville, Mercer county, Pa., ——, 1893.

By DOUGLAS FURNACE COMPANY.
MAX HIRSCHFELD, President.
F. F. OSBORNE, Secretary.

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Mr. Hirschfeld then returned to Sharpsville, and, on the 8th of February, Mr. Schlesinger, through his secretary, Mr. Krielsheimer, wrote a letter to Mr. Hirschfeld in which he said: "You may charge the issued storage warrants to the Buffalo Mining Company at the market price; but it is best that you charge them at round figures per ton,— say $12.50 or $13.00,— *so that you may credit the warrants at the same figure when we return them.*" On the 11th day of February, Mr. Schlesinger wrote again to Mr. Hirschfeld, as follows: "We have this day forwarded to you by express a book of storage warrants. Of the warrants you left with us here, we have used 1 to 15, inclusive, and herewith return to you Nos. 16 and 17, for which you will discharge our account. On receipt of the book sent you to-day, you will please issue for the inclosed two new warrants, and also issue and send us as many more 100 and 200 ton warrants as you have pig iron against which you have not issued any warrants." Mr. Hirschfeld replied to this letter, inclosing twenty-four storage warrants, and stating: "You have now received storage warrants amounting in all to 5,600 tons,— carried out, $74,200,— for which amount we charge you account. *If warrants are returned, they will be credited to you at the above prices.*" On the 4th of March, Mr. Krielsheimer wrote a letter saying that Mr. Schlesinger wished to receive warrants for 2,000 more tons of iron by return mail. On the 7th of March, Mr. Hirschfeld replied to this letter, and inclosed warrants for 1,600 tons of pig iron, and said: "I have now sent you warrants for all the iron in the yard, within a few hundred tons, and, *of course, if we should receive large orders for immediate shipment, some of the warrants will have to be returned.*" On April 6, Krielsheimer telegraphed to Hirschfeld as follows: "Send certificates, if possible, to-day, on everything not yet issued in amount of about 500, made out as before." On April 7, Hirschfeld sent in reply to this request certificates for 2,400 tons. On July 3, Hirschfeld

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sent certificates for 3,000 tons, and said: "We understand that you will return warrants for 1,000 No. 1 Douglas and 1,000 tons No. 2 Douglas, *which we absolutely need, as the iron has been shipped.* We have sent you now warrants for all the iron in the yard except 2,000 tons, from which we make daily shipments."

From time to time between the 4th of March and the 3d of July, 1893, the Buffalo Mining Company, acting through Ferdinand Schlesinger, its president, or William Schlesinger, its treasurer, or Mr. Krielsheimer, borrowed of the Commercial Bank of Milwaukee various sums, the total amount being $97,051.75, and indorsed and delivered to said bank forty-nine of the storage warrants before referred to, which covered or represented an aggregate of 10,800 tons of pig iron. These warrants were first deposited or pledged as security for the indebtedness of the Buffalo Mining Company alone, but on the 12th day of July, 1893, a further agreement was made between the bank, the mining company, and Schlesinger by which the warrants were also hypothecated for any indebtedness owing by Schlesinger to the bank, which amounted to more than $50,000. Mr. Hirchfeld testified, and the fact was not denied, that it was the understanding that the warrants would be returned to the Douglas Furnace Company, and credited back. The entire testimony shows without dispute that it was not supposed or expected that the issuance of any of these warrants constituted a sale of the iron to the Buffalo Mining Company, but that the intention was that the apparent title should be vested in the Buffalo Mining Company for the purpose simply of allowing Mr. Schlesinger and the mining company to borrow money thereon. Upon the books of each corporation a storage-warrant account was opened, separate from the other accounts between the two corporations.

At the time of the levy upon the iron, in July, 1893, there were outstanding, in all, storage warrants representing on

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their face 18,874 tons of pig iron, including the 10,800 tons hypothecated to the Commercial Bank. It appears that there were open accounts kept between the Buffalo Mining Company and the Douglas Furnace Company; that on the 1st of January the mining company was indebted to the Douglas Furnace Company on its account in the sum of more than $5,000; that there were frequent remittances of cash and bills receivable from one company to the other; and that between the 1st of February and the latter part of July, 1893, the furnace company incurred an indebtedness to the mining company for cash and bills receivable remitted to the amount of $338,529.04, and during the same time the mining company became indebted to the furnace company, including the amount charged upon the warrant account, in the sum of $560,832.89, leaving a nominal balance due the furnace company of $222,303.85. There was no change of possession of any of the iron at any time. It remained piled up in the yards of the furnace company in Pennsylvania, without any mark thereon to designate what was covered by the warrants and what was not. The furnaces turned out about 400 tons per day, and this was immediately piled up in the yards, and the business was conducted in all respects as though there were no liens or incumbrances upon the iron. The testimony of Mr. Hirschfeld is that he always had enough iron in the yards to cover all of the warrants outstanding. In June, 1893, it appears that the firm of Corrigan, Ives & Co. began to desire some security for their claims against the furnace company, and they wrote to Mr. Schlesinger, suggesting that regular storage warrants be issued to them upon the pig iron at the furnaces.

About the middle of June, Mr. Hirschfeld, at the direction of Mr. Schlesinger, went to the office of Corrigan, Ives & Co., and had an interview with them on this subject. Hirschfeld testifies that he told them that he did not consider it advisable to take out storage warrants, as they

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would hurt the credit of the furnace company, and that, as the company had always met all its obligations promptly, he saw no necessity of it. Mr. Hirschfeld says he did not tell Corrigan, Ives & Co. at the time that storage warrants had already been issued upon any of the iron at the furnaces. The testimony of the firm, on the other hand, is that Mr. Hirschfeld said at that time that no warrants had been issued upon any of the iron. As a result of this interview, the lease of the ore yards was transferred to Corrigan, Ives & Co., to partially secure them for their claims.

In the month of June, 1893, Corrigan, Ives & Co. became alarmed concerning the financial situation of Mr. Schlesinger and his mining companies. It appears that Corrigan, Ives & Co. had accepted time drafts of Schlesinger's mining companies to the amount of about $200,000, which drafts were then falling due at intervals of only a few days. Schlesinger's mining companies were unable to meet this paper as it was falling due, and, at Schlesinger's request, Corrigan, Ives & Co. placed in his hands $200,000 of fresh paper to take up the old paper as it fell due, which Schlesinger promised to do, but, as a matter of fact, the old paper was not taken up when it fell due. Upon ascertaining this fact, Corrigan, Ives & Co. telegraphed Mr. Schlesinger to come to Cleveland, and he did so, on the 4th of July, 1893. Schlesinger then stated that he had all of the new drafts still in his possession, and agreed to return them, but he did not do so, and both sets of paper remained out and a charge against Corrigan, Ives & Co. On ascertaining this condition of things, an action was brought by *Stevenson Burke*, one of the defendants in this case, against his copartners, in a proper court at Cleveland, to close up the partnership relations; and in that action one Price McKinney was appointed receiver of the firm of Corrigan, Ives & Co.

On the 18th or 19th of July, 1893, Hirschfeld and Kriesheimer went to Cleveland with the avowed purpose of en-

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deavoring to secure the receiver of Corrigan, Ives & Co. for the indebtedness owing them by the Douglas Furnace Company. At that interview Corrigan, Ives & Co. first learned that all of the iron at the furnaces, save about 3,000 tons, was covered by storage warrants. Some hard words were used by the defendant *Burke*, who denounced the issuance of the warrants as a swindle. It is alleged by some of the witnesses that he threatened to make all parties walk the plank. After consultation with attorneys, Mr. Hirschfeld, on the demand of *Burke* and the receiver, McKinney, gave a judgment note representing the whole indebtedness of the furnace company to Corrigan, Ives & Co., and delivered it to the receiver. He also transferred at the same time, as collateral security, about $60,000 worth of book accounts to the receiver, and some other property of small value. On the same day *Corrigan* and *Burke* employed Hirschfeld to work for them at the same rate that he had been employed by the Douglas Furnace Company. Upon receipt of the judgment note, the receiver at once went to Mercer county, Pennsylvania, and entered judgment thereon, and levied upon all the iron in the yard, and thereafter the sheriff sold the same.

The circuit court found that the storage warrants were not issued as security for any debt or demand, but for the purpose and with the intention of vesting title of the pig iron in the Buffalo Mining Company in good faith, and without any intent to defraud the creditors of the furnace company; further, that the intention of the furnace company in the issue and delivery of such storage warrants to the mining company was to make a sale of the iron therein described, and vest the title thereto in the Buffalo Mining Company, so that the mining company might raise money by the sale of said pig iron, or in any manner it saw fit; and that the mining company also had such intention. The court further found that the bank advanced the moneys

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aforesaid to the Buffalo Mining Company upon such storage warrants in good faith, and without any notice or knowledge of any infirmity of title. The court further found that *Burke* and *Corrigan* and McKinney concerted together, and, by threats, persuasion, and fraud, procured the execution of the judgment note aforesaid, for the purpose of at once levying on all the property of the Douglas Furnace Company, without regard to the rights of the holders of the storage warrants; and that they had full knowledge, prior to the taking of the judgment, and prior to the levy and sale, of the rights of the Commercial Bank; and that, by their acts, they had converted the 10,800 tons of pig iron which belonged to the bank to their own use; and also that they fraudulently employed Max Hirschfeld as their own agent, so that he could not or would not, prior to the levy, mark and set off to the holders of the storage warrants any particular parts of the pig iron. The court also found the total amount of the value of the iron was $116,800, for which amount, with interest, judgment was entered against the defendants; and from that judgment this appeal has been taken.

For the appellants there were briefs by *W. J. Turner* and *J. E. Ingersoll*, and oral argument by *Mr. Turner* and *Mr. Stephenson Burke*. They argued, among other things, that storage receipts could lawfully be issued only by a warehouseman or company or other person openly engaged in the storage of goods or property for others for hire. The receipts issued in this case were invalid and created no lien. *Bucher v. Comm.* 103 Pa. St. 528; *People's Bank v. Gayley*, 92 id. 518; *Farmers' & M. Nat. Bank v. Long*, 87 N. Y. 209; *Yenni v. McNamee*, 45 id. 614; *Shepardson v. Green*, 21 Wis. 539; *Shepardson v. Cary*, 29 id. 34, 41; *Thorne v. First Nat. Bank*, 37 Ohio St. 254, and cases cited; *Fishback v. Van Dusen & Co.* 33 Minn. 111; *Merchants' & M. Bank v. Hibbard*, 48 Mich. 118; *Rosenham v. Batjer*, 154 Pa. St. 544.

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For the respondent there was a brief by *Timlin & Glicksman*, attorneys, and *James G. Flanders*, of counsel, and oral argument by *Mr. W. H. Timlin* and *Mr. Flanders*. They contended, *inter alia*, that if a sale is valid under the statute of frauds, the fact that the articles sold are a portion of a larger mass of uniform kind and quality does not prevent the title passing to the purchaser, and the purchaser may maintain trover for such aliquot part of the mass. *Winslow v. Leonard*, 24 Pa. St. 14; *Nash v. Brewster*, 2 L. R. A. 409, and cases cited; *Kimberly v. Patchin*, 19 N. Y. 330; *Pleasants v. Pendleton*, 6 Rand. 473; *Gardner v. Dutch*, 9 Mass. 427; *Young v. Miles*, 20 Wis. 615; *Sanger v. Waterbury*, 116 N. Y. 371; *Burrows v. Whitaker*, 71 id. 292; *Kingman v. Holmquist*, 36 Kan. 735; *Carpenter v. Graham*, 42 Mich. 191; *Wagar v. D., L. & N. R. Co.* 79 id. 648; *Chapman v. Shepard*, 39 Conn. 421; *Hurff v. Hires*, 40 N. J. Law, 581; *Watts v. Hendry*, 13 Fla. 523; *Newhall v. Langdon*, 39 Ohio St. 87–95; *Eldred v. Oconto Co.* 33 Wis. 141; *Starke v. Paine*, 85 id. 633. Where a storage receipt has been issued by one who is not a warehouseman, the great weight of authority is that it is valid as against creditors of the person issuing the same if it is issued as an absolute sale. *Gibson v. Stevens*, 8 How. 384; *Kimberly v. Patchin*, 19 N. Y. 330; *Hale v. Milwaukee Dock Co.* 29 Wis. 490; *Merchants' & M. Bank v. Hibbard*, 48 Mich. 118; *Gibson v. Chillicothe Branch Bank*, 11 Ohio St. 311, 322; *Easton v. Hodges*, 18 Fed. Rep. 677; *National Exch. Bank v. Wilder*, 34 Minn. 149; *Siedenbach v. Riley*, 111 N. Y. 560.

The following opinion was filed February 23, 1897:

WINSLOW, J. The so-called storage warrants were not warehouse receipts, either under the laws of Pennsylvania or of Wisconsin. In order to be such, they must be issued by a *warehouseman* or one openly engaged in the business of storing property for others for a compensation. 1 Brightly's

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Purd. Dig. (12th ed.), 165, § 1; *Bucher v. Comm.* 103 Pa. St. 528; *Shepardson v. Cary*, 29 Wis. 34. And the fact that the receipt was executed by a warehouseman must affirmatively appear in the evidence. *Shepardson v. Cary, supra.* Not only was there no proof in this case that the furnace company was in the warehousing or storage business, but, on the contrary, the proof was conclusive that it was not in such business, and never had been. The fact that it surreptitiously issued the false receipts in question did not constitute it a warehousing corporation. As well might it be argued that the issuance of counterfeit bank bills constitutes the counterfeiter a bank. It seems that, had the certificates been negotiable warehouse receipts, the bank would have acquired a valid lien upon the iron they represented by the transfer and indorsement of the receipts to it by the Buffalo Mining Company. *Price v. Wis. M. & F. Ins. Co.* 43 Wis. 267; 1 Brightly's Purd. Dig. (12th ed.), 165, § 1. But we may dismiss this question, because they were not such certificates, and the plaintiff obtains no advantage from the fact that they were in the usual form thereof. Nor were the certificates valid as chattel mortgages upon the iron named in them, not only because they are not chattel mortgages in legal effect, but also because by the law of Pennsylvania, as well as by the law of Wisconsin, a chattel mortgage is only valid as to third persons when filed in the proper office, and there is no claim of any filing here. 1 Brightly's Purd. Dig. (12th ed.), 665, §§ 200, 201–214.

Thus, at the outset of the case, it appears that the plaintiff had no interest in or lien upon the iron in question, as indorsee of a warehouse receipt nor as a chattel mortgagee. Nor can it be claimed that the plaintiff actually bought or obtained legal title to the iron. These possible claims being thus eliminated, we know of no other claim which the plaintiff can make, unless it be a claim as pledgee of the iron as collateral to the debts of the Buffalo Mining Company

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and of Schlesinger; and this, in fact, is the claim made in the complaint, and the only claim which the evidence tends to justify. It becomes necessary, then, to consider the question whether the evidence shows a valid pledge. The principles of law governing a pledge of personal property are simple and familiar. To constitute a valid pledge, there must be transfer of possession to the pledgee, actual or constructive. *Seymour v. Colburn*, 43 Wis. 71. A pledge differs from a mortgage in this important respect, namely, that the legal title to the property pledged remains in the pledgor, subject to the pledgee's lien for his debt, while a mortgage passes the legal title to the mortgagee. In the case of a pledge, a lien is created, to the existence of which possession is absolutely necessary; in the case of a mortgage, title passes, subject to be revested by performance of a condition subsequent. Jones, Pledges, §§ 4, 7; *Thompson v. Dolliver*, 132 Mass. 103. Therefore, if the bank had any interest in the iron at the time of its seizure, it was that of a lien thereon, by way of a pledge.

In considering the question of whether it had such a lien which was valid as against the creditors of the furnace company, a brief recapitulation of the essential facts will be useful. Ferdinand Schlesinger owned two corporations,— one, a mining corporation, engaged in mining ore in Michigan; the other, a furnace company, engaged in smelting ore in Pennsylvania. These corporations were nominally furnished with full complements of officers, but in fact the business of each was directed and controlled by Schlesinger as though it were his own. The furnace company had a large stock of pig iron constantly on hand in its yards in Pennsylvania, and was largely indebted to Corrigan, Ives & Co., of whom it purchased its iron. It refused to give Corrigan, Ives & Co. security on the iron, on the ground that such a course would injure its credit. In order to raise money for the furnace company, Schlesinger caused the fur-

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nace company to issue apparent storage receipts to the mining company, without consideration, and without agreement to purchase, and without selection or delivery of the property, either actual or constructive, unless the handing over of the receipts be delivery, and with the agreement that the receipts should be returned whenever the furnace company needed them on account of sale of the iron. On receiving the receipts, he borrowed money of the plaintiff bank upon the notes of the mining company, secured by assignment of the receipts as collateral. What was done with all the money so borrowed does not appear. The original purpose seems to have been, as said in respondent's brief, to raise money for the furnace company, and the evidence shows the fact that the mining company was almost daily remitting money in large amounts to the furnace company, as well as the fact that the furnace company was frequently remitting to the mining company. None of the remittances were made in payment of the iron certificates, nor were they ever intended to be applied thereon. The fact seems to be that each enterprise was bolstering up the other as occasion required, or, rather, that Mr. Schlesinger was using the property and credit of his apparently separate concerns indiscriminately, to obtain money as it was needed. It seems probable that much of the money borrowed on the notes of the mining company secured by the receipts in question was forwarded to the furnace company.

The court found that the bank took the certificates innocently, without knowledge of any defect. We cannot probably disturb this finding, because it is based on the affirmative evidence of the cashier who made the loans; but, in view of the facts proven on cross-examination of the cashier himself, this finding seems to be a considerable tax on the credulity. The facts are, in brief, that the cashier was well acquainted with Mr. Schlesinger, so much so that in 1892 Schlesinger put in his hands one share of stock in

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the Buffalo Mining Company, in order that he might become a director of the company, and he was thereupon made a director and secretary of the company, and remained such until April, 1893, when he resigned, and returned his share of stock. This was after the loans on the credit of the receipts had begun to be made. Notwithstanding his high official position in the mining company, he testifies that he "knew nothing of its business," except that it was engaged in mining. We think he could hardly have failed to discover the manner in which Mr. Schlesinger conducted the business of his nominal corporations. However this may be, he knew, as he testifies, that the mining company was engaged in mining ore, and not in buying or selling pig iron. He knew "something" about the furnace company; knew where it was doing business; knew Mr. Hirschfeld, the nominal president; discounted some of the furnace company's paper; obtained general information about it by inquiries through commercial agencies at the time of the pledging of the receipts. In view of all these facts which were within his knowledge, and the facts which he might have ascertained without difficulty by very little inquiry, it seems almost an impeachment of his intelligence to say that he received the receipts in ignorance of any defect or infirmity in them; but we suppose we are bound by the finding, and we shall proceed on that basis.

It is very apparent that, had the certificates remained in the hands of the mining company, they would have constituted no obstacle to creditors of the furnace company in the collection of their debts. They were subject to nearly, if not quite, all the objections which render transfers void as to creditors. They were absolutely false in fact. There was no change of possession of the iron; no payment nor agreement to pay for it; no intention to pass title. They were the merest shams. There was in effect an agreement that the furnace company should remain the apparent owner,

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with the right to sell and receive and dispose of the proceeds of sales, and that it should have the right to call back certificates whenever it needed them for this purpose; and it was further expected that, when the need for borrowing money was over, the certificates should all be returned. The scheme was certainly a brilliant one. If successful, it created a shifting title or interest, which readjusted itself from day to day as the stock changed, automatically attaching to each new pig of iron as it emerged glowing from the furnace, and with equal facility detaching itself from each pig that was sold as it was loaded on the car for transportation to the vendee. Certainly, if such a scheme could be successful, the inventor should take high rank among a certain class of financiers; and the laws which have been supposed to prevent secret transfers and conveyances in fraud of creditors must be at once revised, or they will pass into the dim limbo of unexecuted and worn-out legislation.

It is seriously and ably argued that the scheme has been successful; that the original transaction has been purged of all objections by the intervention of the innocent third person, in the shape of the plaintiff bank; and thus that the shifting and self-adjusting, but void, title of the mining company has been turned into an equally shifting and delusive, but good, lien for the benefit of the bank,— a lien which is secret and invisible to creditors, but entirely visible and very real to the plaintiff. As before said in this opinion, the only interest which the plaintiff claims or can claim in the iron in question is that of a lien thereon as pledgee; and, in order to make a valid pledge, there must have been either actual or constructive delivery of the property pledged. *Bona fides* does not avail the pledgee in the absence of delivery and possession, either actual or constructive. There was confessedly no actual delivery here, and the only thing that can be claimed to be a symbolical or constructive delivery is the indorsement and delivery of the false receipts. Hence the

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question becomes whether the delivery of the receipts under the circumstances is a constructive delivery of so much iron. Had they been in fact warehouse receipts, the transfer and indorsement thereof by way of pledge would have operated as a sufficient constructive delivery of the property, both by the common law and by the statute. R. S. sec. 4194; *Shepardson v. Cary, supra; Price v. Wis. M. & F. Ins. Co., supra.* Bills of lading and railroad receipts are placed by the statutes of both states on the same footing. See statutes of Pennsylvania before cited in this opinion. The reasons for this rule are very apparent. In such cases the property itself is in the hands of a third person or corporation, instead of in the possession of the vendor or pledgor. Consequently it does not furnish any false basis of credit, nor is any creditor deceived, because it is well understood that goods in the hands of warehousemen or carriers are or may be the property of others, and, by the long usage of trade, subject to just this mode of transfer. No such considerations, however, apply in the case of goods in the possession of the vendor or pledgor, or of some third person who is not a warehouseman or wharfinger, and we know of no rule which makes the mere delivery of a receipt a constructive delivery of the property in pledge in such a case. In *Shepardson v. Cary, supra* (which was an action in equity to enforce a pledge of personal property as collateral, alleged to have been made by means of the transfer of a warehouse receipt), DIXON, C. J., says: "To uphold the receipt as a proper warehouse document transferring the title to the property, and operating as a good *constructive* delivery of it to the vendee, it must in all cases distinctly appear that it was executed by a warehouseman, one openly engaged in that business, and in the usual course of trade." There are numerous examples of constructive delivery in the books, but none, we think, which holds that the facts here constitute such delivery. Constructive or symbolical delivery is permitted because of the difficulty or impossibility in some cases, of actual delivery.

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Thus, where the goods are very bulky, as logs in a boom, delivery may be made by pointing them out to the pledgee; or, where they are goods in a warehouse, by a delivery of the keys; or, where a savings bank deposit is to be pledged, it may be done by delivery of the pass book. *Jewett v. Warren*, 12 Mass. 300; Jones, Pledges, §§ 36, 37; *Boynton v. Payrow*, 67 Me. 587. So, also, where goods are in possession of a third person, and the pledgor gives an order on the custodian to hold the goods for the pledgee, which is brought to the knowledge of the custodian, it seems that this would be a sufficient delivery and change of possession. *Whitaker v. Sumner*, 20 Pick. 399; *Tuxworth v. Moore*, 9 Pick. 347. In all these cases it will be readily seen that the property is placed beyond the control of the pledgor, and is not being used to maintain an appearance of wealth by either the pledgor or others with the consent of the pledgee.

In the present case there is no such element. The pledgee never saw or attempted to see the iron described in the certificates, and made no inquiries concerning it. It never notified the furnace company that it held any certificates in pledge, or claimed any interest in any iron in its possession. It tacitly allowed the furnace company to go on in its business for months, selling out the very iron nominally covered by the certificates, and replacing it with other iron, and collecting and using the proceeds of its sales. There can be no constructive or symbolical delivery and continuance of possession logically claimed where such a state of facts appears. Conceding that the title to the iron was in the mining company, the furnace company was the custodian, and the custodian received no notice of pledge, made no agreement to hold for the benefit of the pledgee, but went on in business, selling the property, and substituting other property in its place, with no one to hinder or make it afraid. Apparently the owner of more than 20,000 tons of iron, it was (if plaintiff's theory is correct) really not the owner of it in case a creditor appeared with an execution. It was held in *Casey*

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v. Cavaroc, 96 U. S. 467, that where property alleged to have been pledged has at all times been in the actual possession of the pledgor, with authority to dispose of it and substitute another article of equal value in its place, there exists no pledge as against third persons. No reason is perceived why this is not wholesome doctrine, nor why it does not apply with equal force to possession by a third person, with power of sale and substitution, as in the present case. Our conclusion is that, as against third persons, the bank never perfected its pledge by obtaining possession, either actual or constructive, of the iron named in the certificates, and hence that it cannot maintain this action.

The trial court found that the judgment note was obtained by threats and fraud, for the purpose of at once levying on the property of the furnace company. We have found no evidence in the case which establishes fraud or duress. There was some excited language, but nothing amounting to duress or fraud. Corrigan, Ives & Co. had a right to obtain a judgment note for the very purpose of entering judgment at once, and levying upon the furnace company's property. Such is frequently the purpose for which judgment notes are taken, and such purpose does not, of itself alone, constitute fraud or vitiate the note.

We do not find any evidence that justifies the finding that the defendants fraudulently employed Hirschfeld, so as to prevent him from marking off particular lots of iron to the holders of storage warrants. There is nothing to show that Hirschfeld intended to do so, or that the plaintiff or any one else expected or wished him to do so. Whether he would have done so or not had he not been employed by the defendants is purely a subject of speculation.

These views necessitate reversal of the judgment.

By the Court.— Judgment reversed, and action remanded with directions to dismiss the plaintiff's complaint.

A motion for rehearing was denied, April 30, 1897.

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THE STATE EX REL. BUCHANAN, Appellant, vs. KELLOGG and others, Respondents.

January 16 — April 30, 1897.

Intoxicating liquors: License: Revocation: Mandamus: *Pleading.*

1. Under sec. 1559, S. & B. Ann. Stats. (providing that if upon the hearing of a petition for the revocation of a license to sell intoxicating liquors "the board shall find the complaint to be true, *the license shall be revoked*, and if untrue the proceedings shall be dismissed," etc.), the board is bound to find the complaint true or untrue according to the evidence; and if the undisputed evidence and admitted facts establish its truth the board may be compelled by *mandamus* to revoke the license, even though a majority have voted that the charges were untrue.
2. Where it appears from the relation for a writ of *mandamus* in such a case that the undisputed evidence showed the charges of the complaint to be true and it is alleged that the council wilfully, unreasonably, persistently, and negligently refused to revoke the license, and wilfully and unreasonably abused their power and authority, a return alleging merely that there was conflicting testimony on the trial and that the majority voted that none of the charges of the complaint were true, but not otherwise denying the allegations of the relation or indicating upon what particular facts the testimony was conflicting, is in effect an admission of the truth of the relation, and the peremptory writ should be awarded.

APPEAL from a judgment of the county court of Winnebago county: C. D. CLEVELAND, Judge. *Reversed.*

The case is stated in the opinion.

For the appellant there was a brief signed by *Sweet & Armington*, attorneys, and a separate brief by *B. E. Van Kuren*, counsel, and oral argument by *W. N. Armington* and *B. E. Van Kuren.*

For the respondents there was a brief by *J. H. Davidson*, attorney, and a separate brief by *Eaton & Weed* and *John F. Kluwin*, attorneys for *Krippene* and others, and oral argument by *Mr. Davidson* and *Mr. H. I. Weed.* They con-

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tended that the determination of the question whether the charges against the saloon keeper were true required the exercise on the part of the common council of official judgment and discretion. It was not a ministerial duty, and could not be controlled by *mandamus*. *State ex rel. C., C. & C. R. Co. v. Whitesides*, 3 L. R. A. 777; High, Extr. Leg. Rem. §§ 24, 34, 42, 47, 238; 14 Am. & Eng. Ency. of Law, 141; *People ex rel. Willing v. Meakin*, 56 Hun, 626; *People ex rel. Funke v. Board of Excise of Flushing*, 24 id. 195; *People ex rel. Belden v. Contracting Board*, 27 N. Y. 378; *Hoole v. Kinkead*, 16 Nev. 217; *State ex rel. Gill v. Com. Council of Watertown*, 9 Wis. 254; *State ex rel. Winslow v. Supervisors of Mt. Pleasant*, 16 id. 614; *Waupun v. Chester*, 61 id. 401.

The following opinion was filed February 23, 1897:

CASSODAY, C. J. This is an application for a writ of *mandamus* to compel the mayor and common council of Oshkosh to revoke a license held by one August Kargus for selling intoxicating liquor. The essential allegations in the alternative writ are to the effect that during the times mentioned the relator was a resident, freeholder, and taxpayer in Oshkosh; that she was the mother of two minor boys, one twenty and the other seventeen years of age; that the mayor and the twenty-six aldermen, named therein, were each and all duly elected and duly qualified and entered upon the discharge of their respective duties as such officials; that the city ordinance prohibited any person so licensed to sell liquor from giving away or selling any liquor on Sundays; that August Kargus kept a saloon in the city, in close proximity to the residence of the relator, and was duly licensed by the city to sell liquor, and his license had not expired; that January 23, 1896, the relator made and filed with the city clerk a complaint in writing, as provided by the statutes, alleging, in effect, that said Kargus had sold liquor to the six minors, therein specified, including the two sons of

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the relator, and also sold liquor on Sunday, as therein specified, which allegations were true, and also that said Kargus was keeping a disorderly, riotous, and improper house, and praying that his said license be revoked; that a copy of which complaint, duly verified, was thereto attached; that January 28, 1896, at a regular meeting of the common council, the said complaint was improperly referred to the police committee and city attorney, for the purpose of hindering and delaying action upon the same; that February 11, 1896, at a regular meeting of the common council, the said complaint was reported back to the council, with the recommendation that the complainant be required to give security for costs before summons issued, and the same was adopted, requiring her to file security for costs; that said resolution was adopted for the purpose of preventing any action being taken upon her petition, as she had no property, except a small homestead; that February 19, 1896, the relator filed with the city clerk an undertaking for costs, as required by said resolution; that February 20, 1896, summons was issued as provided for by law, and made returnable at a regular meeting of the common council held February 25, 1896; that February 25, 1896, at a regular meeting of the common council, the respective parties appeared by attorneys; that the complaint was then read, and the said Kargus, for answer, put in oral and general denial; that, without further proceedings in said matter, the council adjourned until March 5, 1896; that March 5, 1896, at a regular meeting of the council, seven witnesses were sworn, and testified in behalf of the complainant, after which the council adjourned until March 12, 1896; that March 12, 1896, at a regular meeting of the council, the case was again taken up, and six witnesses were sworn, and testified in behalf of the complainant, when she rested her case, and the council again adjourned until the evening of March 17, 1896; that on the evening of March 17, 1896, the council, without having taken up the matter,

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adjourned until the evening of March 24, 1896; that on the evening of March 24, 1896, at a regular meeting of the council, the matter was taken up, and seven witnesses were sworn on behalf of Kargus, including himself, whereupon both sides rested, and thereupon the council adjourned until March 31, 1896; that one of such witnesses, and a son of the relator, among other things, testified to the effect that he was twenty years of age, and was in the said saloon of said Kargus, December 25, 1895, and got beer and whisky about half a dozen times; that he had been in said saloon nearly every day, and had bought beer or whisky nearly every day from the said Kargus; that he had been in the said saloon nearly every Sunday, and that he had seen Kargus sell liquor on Sunday to five other minors named; that he had never had any written order from his father or mother or anybody else to get liquor from August Kargus; that the other son of the relator, as such witness, testified to the effect that he was seventeen years old; that he had drank liquor in the said saloon December 25, 1895; that Kargus' son, who was attending the saloon, had given it to him; that he drank three times that day, twice August Kargus gave it to him, and the third time the boy had given it to him; that he never had any written order from his father or mother or anybody else to get liquor from August Kargus; that he had seen four other minors named buy liquor several times and drink in that saloon; that six other minors named, as such witnesses, testified to the same effect; that the said Kargus testified in his own behalf, and admitted that he had sold the two sons of the relator liquor a good many times; that he had sold to one Kleist, one of the other minor witnesses named, on December 25, 1895, a good many times; that he had a written order from the father of Kleist, but refused to produce it, and did not claim to have any other written order or consent; that he sold beer and whisky to three other minors, who were witnesses named, in that

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saloon; that Kargus did not offer any evidence denying that he had sold beer or whisky to the said minors, or any of them, without the written order of their parents, nor that he had been engaged in selling liquor for several months prior to December 25, 1895, on Sunday, and no such evidence was offered or received; that the evidence was undisputed that he sold or gave beer or whisky or both to all of said minors without a written order from their parents, or any one else, except in the case of Kleist mentioned; that it was undisputed that he did sell liquor, beer, or whisky nearly or quite every Sunday for several months prior to December 25, 1895; that nevertheless the common council had wilfully, capriciously, unreasonably, and persistently neglected and refused to find that said August Kargus sold liquor to minors without a written order of their parents or any one else, and had refused to find that he sold liquor on Sunday, and had wilfully and unreasonably and persistently and negligently refused to revoke the license of said Kargus, and had wilfully and unreasonably abused their power and authority.

The verified answer and return of the mayor and common council to the alternative writ of *mandamus* mentioned, after reciting the pendency of such proceedings before the common council for the purpose of revoking such license, stated, in effect, for cause, reason, and excuse why they had not revoked the license, that said Kargus appeared at the time and place named and denied the said complaint; that thereafter each party produced witnesses, and were heard by counsel before said mayor and common council; that the testimony produced by said parties was conflicting; that after the close of the testimony, and after argument by counsel, the mayor and said common council, by a vote of nine in the affirmative and twelve in the negative, refused to adopt a resolution to the effect that the allegations in the complaint of the relator against August Kargus, a saloon keeper, for the revocation of his license, are true in refer-

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ence to selling liquor to minors without a written order from their parents or guardians; that the mayor and common council, by a vote of ten in the affirmative and eleven in the negative, refused to adopt a resolution to the effect that the allegations in the complaint of the relator against August Kargus, a saloon keeper, for the revocation of his license, are true in reference to the selling of liquor on Sundays; that the mayor and common council, by a vote of four in the affirmative and seventeen in the negative, refused to adopt a resolution to the effect that the allegations in the complaint of the relator against August Kargus, a saloon keeper, for the revocation of his license, are true in reference to keeping an improper house; that said proceedings were had and said hearing procured before the mayor and common council under secs. 1558, 1559, S. & B. Ann. Stats.; that a majority of the aldermen present found the complaint untrue, and that the proceedings were dismissed; that, therefore, they could not cause the license of said Kargus to be revoked as by said writ they were commanded.

At the close of the trial and hearing the trial court refused to award the writ of *mandamus*, and ordered and adjudged that the petition therein be, and the same was thereby, dismissed, and that the common council go hence without day, and that they have and recover from the relator herein their costs and disbursements of this action, taxed at $35.23. From that judgment the plaintiff brings this appeal.

It will be observed that the answer to the relation does not deny any allegation contained therein. The only defense or claim relied upon is that there was conflicting testimony on the trial before the common council, and that a majority of the council voted that none of the allegations of the complaint in respect to selling liquor to minors, or on Sunday, or keeping an improper house, were true. The answer fails to indicate upon what particular fact the testi-

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mony was conflicting. Since it admits, in effect, that the accused sold liquor on Sunday, as charged, and also sold liquor to minors without the written order of their parents or guardians, as alleged, we must assume that the conflicting testimony mentioned related to some other and immaterial fact. In other words, the answer concedes the guilt of the accused as charged, and that the common council refused to revoke his license, notwithstanding such guilt; and so the trial court refused the *mandamus*, as we assume, on the ground that the majority of the council so voted. "A proceeding by *mandamus* is essentially a suit, and when issue is joined by the return it becomes a civil action, within the meaning of the statutes, and as to the form and sufficiency of the several pleadings must be governed by the same rules which prevail in other civil actions." *State ex rel. G. B. & M. R. Co. v. Jennings*, 56 Wis. 113. The admissions in the answer in this case therefore are just as conclusive upon the defendants as the admissions in an answer in any civil action. *Id.*

The question recurs whether, upon such facts, so admitted by the pleadings, the common council were at liberty to so refuse to revoke the license. The complaint was properly made to the common council, and the hearing had as prescribed by the statutes. S. & B. Ann. Stats. sec. 1558. The statute also provides that "If upon such hearing, the board shall find the complaint to be true, *the license shall be revoked*, and if untrue, the proceedings shall be dismissed without costs to the accused, and if the complaint be found by the board to be malicious and without probable cause, the costs shall be paid by the complainant, and the board may require security therefor before issuing the summons, as aforesaid." S. & B. Ann. Stats. sec. 1559. Manifestly, the common council were bound to find the complaint to be true or untrue, according to the evidence introduced. *State ex rel. Higgins v. Mayor & C. C. of Beloit*, 74 Wis. 267.

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They could not rightfully, and against the undisputed evidence and the admitted facts, find the complaint to be untrue. As a general rule, *mandamus* only lies where there is no other adequate remedy, and cannot be availed of as a writ of error. *In re Atlantic City R. R. Co.* 164 U. S. 633. Here there is no other adequate remedy. But so long as an inferior court or tribunal acts within the scope of its authority touching any matter about which it must exercise its discretion, its action cannot be revised by *mandamus*. *Hull v. Sup'rs of Oneida Co.* 19 Johns. 259; *S. C.* 10 Am. Dec. 223; *Ex parte Railway Co.* 101 U. S. 711; *State ex rel. Comstock v. Joint School Dist. No. 1*, 65 Wis. 631. This is illustrated by the well-settled rule that an inferior court may be compelled to settle a bill of exceptions, but cannot be compelled to sign a particular bill of exceptions. *Ex parte Bradstreet*, 4 Pet. 102; *Chateaugay O. & I. Co., Petitioner*, 128 U. S. 544.

It is not the province of a *mandamus* to determine and adjudicate disputed rights, but to enforce undisputed rights and duties. *State ex rel. Pfister v. Mayor & Aldermen of Manitowoc*, 52 Wis. 427, and cases there cited. But in the case at bar, as indicated, there were no disputed facts to be determined, and no discretion to be exercised. The return to the alternative writ denied no allegation therein, and so admitted the several charges contained therein, including the charges that the defendants, as mayor and common council, wilfully, unreasonably, persistently, and negligently refused to revoke the license, and wilfully and unreasonably abused their power and authority. Such being the admitted facts, the peremptory writ of *mandamus* should have been awarded. This conclusion is supported by numerous authorities. *Prospect Brewing Co.'s Petition*, 127 Pa. St. 523; *Comm. ex rel Century Co. v. Philadelphia*, 176 Pa. St. 588; *Zanone v. Mound City*, 103 Ill. 552; *Illinois State Board of Dental Examiners v. People ex rel. Cooper*, 123 Ill. 227; *State ex rel. Blenkenship v. Texas County Court*, 44 Mo. 230; *Amperse v. Com-*

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mon Council of Kalamazoo, 59 Mich. 78; *McLeod v. Scott*, 21 Oreg. 94; Merrill, Mandamus, § 40. Thus in the last Illinois case cited it was held: "A public officer or inferior tribunal may be guilty of so gross an abuse of discretion, or such an evasion of positive duty, as to amount to a virtual refusal to perform the duty enjoined, or to act at all in contemplation of law. In such case *mandamus* will afford a remedy. The discretion vested in official bodies must not be exercised arbitrarily, for the gratification of feelings of malevolence, or for the attainment of merely personal and selfish ends, but for the public good, and should be controlled by an honest judgment, and not by passion or prejudice." So, in the first of the Pennsylvania cases cited, it was held, in effect, that the return to the alternative writ requires the greatest possible certainty, or it will be regarded as insufficient. See, also, *Schend v. St. George's German Aid Soc.* 49 Wis. 241; *State ex rel. Hawley v. County Board of Sup'rs of Polk Co.* 88 Wis. 355. This last case is the same in principle, as to the functions of a *mandamus*, as the case at bar, and hence the discussion need not be further continued.

By the Court.— The judgment of the county court of Winnebago county is reversed, and the cause is remanded with direction to enter judgment in favor of the plaintiff, awarding the peremptory writ of *mandamus* as prayed.

A motion for a rehearing was denied April 30, 1897.

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See EVIDENCE, 5. INSURANCE, 5, 9, 11.

A committee appointed by the directors of a bank from their number, and authorized by them to purchase certain lots for the bank on such terms as should seem to them most advantageous to it at a price not exceeding a sum named, is a special agent and must act within the special authority given; and it has no power to bind the bank to pay a larger sum for those lots than the price fixed by the board, or to give in addition another parcel of land; much less have the president and cashier of the bank, either as members of the committee or by virtue of their offices, power to delegate such authority and discretion to a third person and bind the bank to pay him a commission for his services. *Bryant v. Bank of Commerce*, 476

APPEAL.

See CRIMINAL LAW, 1. PRACTICE, 5. WRIT OF ERROR.

What appealable.

1. An order setting aside a notice of *lis pendens* is not appealable under ch. 212, Laws of 1895. *Kunze v. Kunze*, 264
2. An order denying a motion to require plaintiff to elect whether he will proceed upon a cause of action on express contract or upon one on *quantum meruit* is not appealable under ch. 212, Laws of 1895. *Milbauer v. Schotten*, 28
3. An order of the circuit court, denying a motion to vacate an order for the bringing in of additional parties, is not appealable under ch. 212, Laws of 1895. *Cook v. City of Menasha*, 215
4. An order striking out a demurrer as being frivolous is not the same as one overruling a demurrer, within the meaning of ch. 212, Laws of 1895, and hence it is not appealable, even when made by the

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court. An order refusing to vacate a chamber order is not appealable unless the original order would have been appealable if made by the court. *Jacobs v. Beebe*, 389

5. An order denying a motion for a new trial, based on the minutes of the court, is not appealable under ch. 212, Laws of 1895. *Hawkins v. Lutton*, 492

Judge's certificate.

6. An appeal in a *quo warranto* case to try the title to an office is not within the provisions of ch. 215, Laws of 1895, limiting the right of appeal to the supreme court in cases involving less than $100, by requiring a judge's certificate. That chapter applies only to cases involving money, or some right the value of which can be computed in money. *State ex rel. Hinz v. McKone*, 216

7. An appeal in a case involving less than one hundred dollars will be dismissed, unless the judge's certificate as to questions of law to be decided (required by ch. 215, Laws of 1895) states the ultimate facts on which the particular questions of law are raised, so that the supreme court can determine the same without reference to the record. *Burkhardt v. Elgee*, 375

Exceptions.

8. In order to bring up for review in the supreme court exceptions to the rulings of a referee on the admission of evidence, they must be renewed in the circuit court upon the motion to confirm or set aside the referee's report, and the exceptions to the rulings of that court thereon be preserved in the bill of exceptions. *Hinz v. Van Dusen*, 503

9. The verdict of a jury in a contest as to the probate of a will has substantially the same advisory effect as a verdict on a feigned issue in chancery, and consequently exceptions to the admission of testimony cannot work a reversal on appeal. *Bryant v. Pierce*, 331

Return on appeal.

10. Unless the affidavits on which the court below acted in making the order appealed from are returned with the record, the supreme court will dismiss the appeal, even though they had never been filed in the court below. All papers must come to that court under the certificate of the clerk of the lower court and cannot be filed for the first time in the supreme court. *Hoffman & Billings Mfg. Co. v. Burdick*, 342

Findings sustained.

11. Where the questions raised on appeal are purely questions of fact, and there is evidence to sustain the findings of the court and no preponderance of evidence against them, the judgment will be affirmed. *Magee v. Miss. River Logging Co.* 377

12. Upon appeal, the findings of the trial court are not to be disturbed, unless they are clearly against the weight of the evidence. *Catura v. Kleiner*, 378

13. Findings of fact will not be disturbed on appeal, if supported by the evidence. *Pomeroy v. Heddles*, 453

14. A judgment in an equity case will not be reversed because of the rejection by the trial court of record evidence, where the record so rejected is returned with the bill of exceptions and can therefore be considered by the appellate court. *Ibid.*

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15. The findings of fact of a referee will not be disturbed on appeal, unless against the clear preponderance of evidence. *Hinz v. Van Dusen*, 503

16. Upon appeal in a case involving only questions of fact, where the verdict was fairly sustained by the evidence, the judgment was affirmed. *Bursinger v. A. Fuermann Brewing Co.* 597

17. A judgment denying probate of a will because of the mental incapacity of the testator and of undue influence, found by both court and jury upon sufficient evidence, will not be disturbed on appeal. *Bryant v. Pierce*, 331

18. A finding in an action to recover notes fraudulently transferred that the transfer was not fraudulent will not be disturbed on appeal, if there was sufficient evidence to support it, though there was evidence which might have sustained an opposite finding. *Piening v. Endress*, 242

19. Upon appeal from a judgment of the circuit court disallowing claims against an estate, if the findings of the court are fairly supported by the evidence such judgment will be affirmed where, though the evidence on the part of the claimant is not specifically contradicted by any witness, it is rendered inherently improbable by other evidence. *Daniels v. Smith*, 639

Immaterial errors.

20. The exclusion of an answer to a question asking an explanation of letters put in evidence, if error, is harmless where the witness had already testified fully as to all that the question was calculated to elicit. *Millerd v. Thompson*, 343

21. Improper remarks made by counsel for the plaintiff in addressing the jury, in respect to the reasons why a second trial of the case became necessary, *held* not sufficient ground for disturbing the verdict, where, on objection being made, the jury were instructed to disregard them. *Slensby v. Milwaukee St. R. Co.* 179

22. A judgment will not be disturbed because of remarks made by the court to counsel, during the trial, relative to his mode of cross-examining witnesses or the unnecessary repetition of questions, where it does not affirmatively appear that the appellant was prejudiced thereby. *McMahon v. Eau Claire Water Works Co.* 640

23. If, when a jury returns into court for further instructions, the stenographer is absent, but one of defendant's counsel is present, and he keeps silent when the court remarks that instructions cannot be given in the absence of the stenographer without the consent of parties, his silence must be deemed to be consent, and a waiver of the necessity of a written charge. *Ibid.*

24. Where a motion to set aside a judgment by default against non-resident defendants is made in their name by their assignee in insolvency, for the purpose of obtaining possession of property in this state for administration in such proceedings, and it appears that the defendants made no effort to defend; that their assignee under a voluntary assignment had merely instructed attorneys in this state to interpose an answer which would delay proceedings until it should be determined whether a defense ought to be made, but had not put them into possession of the facts upon which to base a defense, or informed them that personal service on the defendants had been had without the state; and that such attorneys had not put in such defense within twenty days because they sup-

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posed service had been obtained by publication, the denial of the relief sought is *held* not to be such a clear abuse of discretion as to warrant a reversal. *Pfister v. Smith*, 51

APPEARANCE. See WAIVER, 1.

ARREST. See CRIMINAL LAW, 2. MUNICIPAL CORPORATION, 2.

ASSAULT AND BATTERY.

1. In an action for assault and battery and false imprisonment, against a game warden who arrested the plaintiff without a warrant, charging him with a violation of the laws for the protection of game, where the issue was whether the shooting of ducks was done in the nighttime, the mere fact that the plaintiff was committing a purely technical trespass by floating in the early morning over the submerged lands of a third party cannot be deemed a sufficient provocation to mitigate the damages for an assault and battery by such warden in making the arrest, and therefore evidence of possession of the premises by the owner, and of the posting of notices warning against trespasses, is irrelevant and not admissible. *Lamb v. Stone*, 254

2. In such an action, where there is some evidence of violence on the part of the officer, a charge that punitive damages may be given for an assault and battery made with circumstances of aggravation or cruelty, with vindictiveness or malice, is not erroneous. *Ibid.*

ASSESSMENTS. See MILWAUKEE, CITY OF, 4.

ASSIGNMENT.

See GARNISHMENT, 2. INSURANCE, 1–3.

A cause of action for a personal injury through negligence is one which, under ch. 280, Laws of 1887, amending sec. 4253, R. S., survives, being clearly within the meaning of the amendatory clause, "of other damage to the person," and it is therefore assignable before judgment. The assignment, in this case, of a verdict for such an injury by the plaintiff to his wife is sustained to the extent of his actual indebtedness to her. *Lehmann v. Farwell*, 185

ATTACHMENT.

In an attachment suit, evidence that the maker of the notes sued on absconded two months after they were made, taking with him a large amount of property and money, and, though having in his possession property largely in excess of his debts, left too little to satisfy all of his creditors, does not establish that he was insolvent when he departed, and much less that he was so when he gave the notes; nor that he then intended to abscond and not pay them. *Landauer v. Espenhain*, 169

ATTORNEYS. See COUNTY.

BANK. See AGENCY. FRAUDULENT CONVEYANCE, 1.

BENEFIT SOCIETY.

See INSURANCE, 1–3.

1. A corporation, organized under sec. 1771, S. & B. Ann. Stats., for the purpose, as expressed in its articles of incorporation, of "mutual

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aid in case of sickness, accident, and death of its members, or their families, . . . without capital stock, and organized solely for benevolent and charitable purposes, and no dividend or pecuniary profits shall ever be made or declared;" and by its constitution declaring its object to be "to associate all male persons of good character who are sociably acceptable, and to the best of its ability provide their relatives with material and moral aid; to establish a relief fund for the benefit of its sick members; to establish a fund out of which there shall be paid, upon sufficient proof of the death of a member in good standing, . . . a sum of not exceeding $2,000 to the heirs as directed by the member," has no authority, either under the statute, or under its articles of incorporation or its constitution, to issue a benefit certificate payable to a person who is neither of kindred to nor a member of the family of the member to whom it is issued. *Groth v. Central Verein G. U. G. Germania*, 140

2. An attempt by a member of such a society, to whom a certificate had been issued in favor of his parents, to substitute as beneficiaries strangers to whom he was indebted for care in sickness, but who were not of kindred to him or members of his family, being contrary to the statute and to the articles of incorporation of such society, was null and void, and constituted no consideration for the surrender of such certificate, nor did the surrender and cancellation thereof relieve the society from liability to the parents. *Ibid.*

3. A benefit society, by receiving into membership a person who had previously been grossly intemperate and who had taken the Keeley treatment for the cure of the liquor habit, with knowledge on the part of the person who took his application at the time thereof that he had taken such treatment, thereby waives the conditions in the application in respect to the use of intoxicating liquors, so far as such use was implied in the taking of such treatment; and in this case evidence that such officer had knowledge of the facts was properly admitted. *De Witt v. Home Forum Benefit Soc.* 305

4. Where an applicant for membership in a benefit society in terms "covenants and warrants" that her answers to questions in her application are full, complete, and true, and that the truth of such application shall be the basis of her rights of membership, and upon the certificate there is an indorsement that it is "issued on the faith that the application made is complete and true and contains all her answers and statements, otherwise this certificate shall be void," the answers in such application are all warranties, and a false affirmative answer to the question "Are you now in sound health?" renders the certificate of insurance void, even though the assured believed when she made it that it was true. *Boyle v. Northwestern Mut. R. Asso.* 313

BONA FIDE PURCHASER. See NOTICE OF LIS PENDENS, 2.

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CONSTITUTIONAL LAW.

See STATE BOARD OF HEALTH, 1, 2. TAXATION, 2.

1. The restriction of subd. 6, sec. 31, art. IV. Const., against the enactment of special legislation "for the assessment and collection of taxes or for extending the time for the collection thereof" embraced all the proceedings for raising money by the exercise of the taxing power from the inception of the proceeding to its conclusion, and took from the legislature all power, past, present, and future, of special legislation on the subject. Laws, therefore, limiting the amount which it shall be lawful for a certain county and the several towns therein to raise and expend for the various purposes for which taxes may be levied, are unconstitutional and void. [Whether such laws are in violation of sec. 23, art. IV, Const., providing for a uniform system of town and county government, not determined.] *Chicago & N. W. R. Co. v. Forest County,* 80

2. Chapter 203 of the Laws of 1895, providing that habitual drunkards who are "pecuniarily unable to procure and pay for treatment for such disease" may, by order of the county court or of the judge thereof, be sent for treatment to some institution in the state for the cure of such disease at the expense of the county in which they reside, is not a legitimate exercise of the police powers of the state. It also involves the imposition upon the county, without its consent, of a tax for the benefit of private institutions and individuals, not the legitimate objects of public charity. It is therefore unconstitutional and void, and an institution to which a drunkard has been so sent for treatment cannot recover from the county therefor. *Wisconsin Keeley Institute Co. v. Milwaukee County,* 153

3. The provision of ch. 278, Laws of 1883, requiring as a condition for the maintenance of an action by the former owner to recover land conveyed by a county holding a tax title thereon to the state, and subsequently sold by the state, that the plaintiff shall pay into the county treasury the amount of taxes paid since the sale, with costs and expenses, is not in conflict with sec. 9, art. I of the state constitution, securing to every one a certain remedy in the law for all wrongs, etc., without purchase, etc., since such payment is not absolute, but is a deposit pending the suit, and the money is to be returned to the plaintiff in case he fails to recover the land. *Lombard v. McMillan,* 627

4. The state having conveyed the lands is under some obligation to make the title good to its grantee, and the provision of ch. 301, Laws of 1885, allowing the state to be made a party defendant to pending actions to recover such lands in order to protect its own interest, does not contravene any constitutional right of the plaintiff therein. *Ibid.*

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CONTRACT.

See INSURANCE, 6, 9–11. MARRIED WOMEN, 1, 2. RECEIPT. SPECIFIC PERFORMANCE, 1. STREET RAILWAYS, 2. VENDOR AND PURCHASER, 1.

1. A contract by which plaintiff's intestate was "to do all the excavating which" defendants "desired to have done," to be "fully completed on or before September 1, 1892," was satisfied by the doing of so much of the grading as the defendants desired to have done before said date, so that no recovery could be had by them under a provision for the payment of $10 per day liquidated damages for each day the work remained uncompleted after September 1. *Boden v. Maher*, 65

2. A combination by an association of masons and building contractors, embracing more than four fifths of those classes in a city, to suppress fair and free competition in bidding for contracts, evidenced by private by-laws requiring every member to submit all bids proposed to be made by him to such association, and if found to be the lowest bidder and entitled to the contract, to add to such bid, before submitting it to the owner or architect of the proposed building, six per cent. of the contract price, which he is to pay to the association, and give it his note therefor, and in that manner to exact from owners six per cent. in excess of a fair price, is contrary to public policy, unlawful, and void. *Milwaukee Masons & Builders' Asso. v. Niezerowski*, 129

3. A note given to such association by a member thereof for the percentage required by such a by-law to be paid on a contract taken is founded upon an unlawful consideration, and is therefore void and will not be enforced. *Ibid.*

4. If a written contract for the performance of services fixes no time for payment therefor, it is due on demand; and if there is nothing on the face of the contract to indicate that it does not embody the entire agreement between the parties, parol evidence is not admissible on the part of the defendant in an action on the contract to prove a contemporaneous agreement postponing payment. *Cliver v. Heil*, 364

5. The plaintiff sent a written proposition to the defendants in which they said, "We herewith give you estimate and specifications for heating your new house; . . . we will furnish and set up one No. 290 furnace . . . complete and ready for use. . . . We guarantee capacity of this furnace, under proper management, to heat all rooms with registers connected with furnace" to a specified temperature, "provided that in the event of failure, we are immediately notified of such failure of said furnace so to heat said rooms. In case of said failure and notice of the same, we shall have the option of making said apparatus heat said rooms as agreed, or to remove the same, we refunding the money paid thereon." The defendant accepted the proposition. *Held*, that it constituted a contract on the part of the plaintiff to furnish a furnace or apparatus suitable for heating defendant's house to the prescribed temperature by a volume of hot air, and its representations constituted an express warranty that it should be suitable and sufficient for that purpose; and that a furnace which was so defective as, when properly used, to send forth noxious coal gas to such an extent as to render the rooms unwholesome and unsuitable for occupancy, is not a suitable one for heating a house, though it may be able to furnish the required degree of heat; and such defect is a

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good defense to an action to enforce a lien for the price, of which the defendants may avail themselves without taking out and delivering the furnace to the plaintiff. *Fuller-Warren Co. v. Shurts*, 606

6. A debtor who, to secure his sureties in a bond to his creditor, has given them a bill of sale of the property bought from such creditor, they agreeing to take proper care of the property, dispose of it to the best advantage, and collect his accounts, and, after paying expenses, pay the balance to the creditor until he is fully paid, and return the remainder, if any, to the debtor, cannot, after such sureties have paid over a part of the proceeds of the property to the creditor, rescind the contract and revest the title of the property in himself by demanding a return thereof, because of the refusal of such sureties to pay over the balance to the creditor; nor can he, after making such demand, maintain an action against them for the conversion of the property. *Miller v. Palmer*, 526

7. A contract by partners to hire an employee for five years at stipulated wages to be paid monthly is required by the statute of frauds to be in writing, and it cannot be changed or superseded by a contemporaneous or a subsequent parol agreement so that, instead of a joint liability of the partners, each of them shall be responsible for only one half of such wages; nor is parol evidence of such an agreement admissible in an action upon the written contract. *Hanson v. Gunderson*, 613

CONVERSION.

See CONTRACTS, 6.

In an action for the conversion of a quantity of paving cedar, evidence that the same was delivered on defendant's dock for storage; that it was afterward removed by defendant to its yard; and that when it was demanded by plaintiff the defendant failed to produce the same property, but offered to deliver some intermixed cedar of inferior quality, is *held* to sustain a finding of a conversion. *LaChapelle v. Warehouse & Builders' Supply Co.* 518

CORPORATION.

1. A corporation, with the consent of one who had subscribed for a large number of shares of its stock, proceeded to sell out to other parties its entire authorized stock, not reserving the shares subscribed for by him, and received payment therefor. *Held* that, in an action between the corporation itself and such subscriber (creditors not being interested), it could not recover on his subscription. *Level Land Co. No. 3 v. Hayward*, 109

2. A corporation becomes such, under our statute (secs. 1772, 1773, R. S.) on the day upon which its articles of incorporation are filed for record in the office of the proper register of deeds, and it is then capable of contracting obligations in its corporate capacity, though not fully organized; subject, however, to the statutory disability as to enforcing contracts made with nonmembers, before at least one half its stock shall have been subscribed for and twenty per cent. thereof actually paid in, and also to the personal liability of the stockholders upon such contracts. *Badger Paper Co. v. Rose*, 145

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3. Until such a corporation has become fully organized by the election of directors, the signers of the articles of incorporation have authority to manage its affairs, and a contract made by them in the name and for the benefit of the corporation binds it. No ratification thereof is necessary; yet if the corporation when organized does ratify the same, such ratification will relate back to the time when the contract was made. *Ibid.*

4. A person does not become a stockholder by merely signing a written agreement to take stock in a corporation to be formed, nor until such subscription paper has been presented to the corporation and accepted by it; and consequently he is not subject to personal liability upon a contract made before he so becomes a stockholder. *Ibid.*

COSTS.

See APPEAL, 2, 5. PRACTICE, 8.

1. Upon setting aside a judgment entered by default, and granting a new trial, under sec. 2832, R. S., on the ground of mistake or excusable neglect, the circuit court may properly impose upon the moving party the payment of the reasonable expenses incurred by the adverse party, which he would lose by the opening of such judgment, but not such as were unnecessary or excessive, though actually incurred. *Behl v. Schuette,* 441

2. Sec. 3162, R. S., does not, in terms, give costs to the prevailing party in a foreclosure action, but it leaves the matter to be regulated by sec. 2918, R. S., which provides that "in all equitable actions costs may be allowed or not to any party, in the discretion of the court." The word "costs" so used includes solicitor's fees stipulated in a mortgage. *Spengler v. Hahn,* 472

3. This discretion as to costs should not be exercised arbitrarily, but the long-established rule that the prevailing party is entitled to full costs should prevail, unless the ends of justice require a departure therefrom. *Ibid.*

COUNTY.

See CONSTITUTIONAL LAW, 2. SHERIFF.

An attorney who is appointed by the court to assist the district attorney in a criminal case, under the provisions of ch. 334, Laws of 1887 (sec. 752*a*, S. & B. Ann. Stats.), is entitled to be paid in the same manner as is provided by sec. 4713, R. S., for paying attorneys appointed to defend indigent criminals, that is, upon an order, entered in the minutes of the court in which the services are performed, certifying what is a reasonable compensation, and without such a certificate he cannot recover from the county for such services. *Williams v. Dodge County,* 604

COUNTY COURT. See GUARDIAN, 1.

COURT AND JURY.

See HIGHWAYS, 1. NEGLIGENCE, 4, 6. PRACTICE, 1, 3, 7.

1. Where four witnesses have testified positively to the giving of customary signals by a locomotive, the testimony of two witnesses who were where they could have heard the signals, that they heard

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none but gave the matter no attention, was insufficient to require the submission to the jury of the question whether signals were given. *Wickham v. C. & N. W. R. Co.* 23

2. In an action where the evidence is circumstantial, its effect is to be determined by the jury, and it is not error for the court to refuse to instruct them that there is no evidence to establish a certain fact. *Agnew v. Farmers' M. P. F. Ins. Co.* 445

3. In an action by an employee for an injury alleged to have been caused by the negligence of the employer in not covering or guarding his machinery, the question whether subd. 2, sec. 1636*f*, S. & B. Ann. Stats., required it to be covered or guarded depends upon whether it was "so located as to be dangerous to employees when engaged in their ordinary duties," and that is a question of fact for the jury. *Guinard v. Knapp-Stout & Co. Company,* 482

COURT COMMISSIONER.

Under sec. 2815, R. S. (authorizing a court commissioner to exercise the powers of a circuit judge at chambers except where an order or proceeding is authorized to be made or taken by the presiding judge or circuit judge), and sec. 2640 (providing that an order for the personal service of a summons without the state may be made by the court or a judge thereof), such an order may be made by a court commissioner. *Pfister v. Smith,* 51

CREDITOR'S ACTION.

1. The plaintiffs in an action to enforce a parol trust in lands conveyed in fraud of creditors are in no position to maintain the action as a creditor's bill, unless it appears that they have exhausted their legal remedies,—that their claim has been reduced to judgment and an execution thereon has been returned unsatisfied. *Krouskop v. Krouskop,* 296

2. To sustain an action by a creditor against a corporation, its directors, and some of its stockholders, to impeach a mortgage given by such directors, as being fraudulently given for the purpose of securing to themselves preferences over other creditors, the plaintiff must show that the corporation was insolvent at the time it was given, or that such directors knew that suspension was impending. *Hinz v. Van Dusen,* 503

CRIMINAL LAW.

1. A proceeding under ch. 196, R. S., "to prevent the commission of crime," by binding over to keep the peace, is not the trial of a criminal offense, but a proceeding before a magistrate; and an appeal from the final order therein must, under sec. 4827, R. S., be taken to the circuit court. This rule is not changed by ch. 99, Laws of 1891, giving to the county court of Waukesha county concurrent civil and criminal jurisdiction in certain cases, or by ch. 22, Laws of 1895, creating a municipal court in that county and giving to it the criminal jurisdiction of a justice of the peace, and an appeal will not lie from an order of the municipal court in such a case, to the county court. *Weisselman v. State,* 274

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2. At common law the term "disorderly house" means a house the inmates of which behave so badly as to become a nuisance to the neighborhood, or one which is kept in such a way as to disturb or scandalize the public generally, or the inhabitants of a particular locality, or the passers-by; and it has that meaning in a city ordinance which provides for the punishment of any person found in a "disorderly house, or a house of ill fame, or a place resorted to for the purpose of prostitution." To be a "disorderly house" it need not be a house of prostitution. *Hawkins v. Lutton*, 492

3. The determination of the trial court upon a preliminary inquiry as to whether an alleged confession was voluntary is controlling, unless it shall be made to appear satisfactorily that such determination is clearly against the evidence. *Connors v. State*, 77

4. A confession need not have been volunteered or spontaneous in order to render evidence thereof admissible, it being sufficient if it was made freely, without compulsion, and voluntarily, without promise or persuasion. *Ibid.*

5. A confession, made to a chief of police shortly after he had forcibly disarmed the accused person who was in his custody to prevent him from injuring another, is admissible where it appeared that there was an interval between the struggle and the confession; that the accused was not asked to confess; and that no inducements were held out to him and no threats made. *Ibid.*

6. An instruction that "the state has sought to prove the defendant's guilt by introducing certain alleged confessions and admissions, and by showing that he was seen, after the burglary, carrying something under his coat," is not an instruction that the defendant was so seen. *Ibid.*

7. Upon a trial for homicide, the court, after charging, as requested by the defendant, that, if the defendant unnecessarily killed the deceased while resisting an assault upon him with intent to do him great bodily injury, they might find him guilty of manslaughter in the second degree, proceeded of its own motion to charge them that "if the defendant was not justified by the law of self-defense in shooting and killing Q. (the deceased), and the killing of Q. was therefore unnecessary and unlawful; and if you are convinced by the evidence beyond a reasonable doubt that when he shot and killed Q. he did so pursuant to an *intent then distinctly formed* in his mind to kill Q., you cannot lawfully find the defendant guilty of manslaughter in the second degree, for the defendant in such case, if he killed Q. from *premeditated design* to kill him, is guilty of murder in the first degree." *Held*, that the latter instruction was manifestly erroneous in failing to distinguish between the intentional and unnecessarily killing under the circumstances stated in sec. 4351, R. S., and a killing when perpetrated by premeditated design to effect the death of the person killed, which would be murder in the first degree. MARSHALL, J., dissents. *Terrill v. State*, 276

8. Where, in such a case, the evidence would have sustained a verdict finding the defendant guilty of manslaughter in the second, third, or fourth degree, in case the defense of justifiable homicide was not substantially made out, *held*, that it was the duty of the court to accurately give to the jury the law of whatever degree of felonious homicide the evidence tended to prove; and to refuse to do so, and in effect to charge them that they must acquit the defendant or else convict him of either murder in the first degree or manslaughter in the second degree, was error. *Ibid.*

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DAMAGES.

See INSTRUCTIONS TO JURY, 5. MASTER AND SERVANT, 10.

1. In a proceeding by a municipal corporation to condemn land for a street through a tract which is used for agricultural purposes only, no speculative damages or values should be allowed, nor should the value of the land taken be determined by what it might be worth at some remote future time, when it might be used for some other purpose, but it should be governed by the fair market value thereof at the time it was taken, for any purpose for which it might reasonably be used in the immediate future; and if its adaptability to some use to which it might be put in the near future, such as platting into city lots, increased its value at that time, such increase would be a proper ground of assessment of damages. *Alexian Bros. v. City of Oshkosh,* 221

2. Paving cedar being an article of general merchandise, the proper rule of damages for its conversion is its value as such merchandise and not as firewood, and it is not error in an action for such conversion to exclude evidence of its value for firewood. *LaChapelle v. Warehouse & Builders' Supply Co.* 518

3. In such action, the exclusion of testimony as to value by a witness who said that he did not know of any demand for paving cedar for home use or anywhere, nor know what its market value was at the time it was converted, could not prejudice the defendant, and was not an error for which a judgment for the plaintiff should be reversed. *Ibid.*

4. Where, in such action, the only evidence as to the value of the property fixed it at ten dollars per cord, it was not error for the court to instruct the jury to allow that value for all that they should find had been converted, with interest at six per cent. from the commencement of the action. *Ibid.*

5. In an action for a personal injury caused by negligence, a verdict for $5,000 damages is *held* not excessive, where there was evidence that the plaintiff was suffering from paresis as a result of the injury. *McMahon v. Eau Claire Water Works Co.* 640

DEBTOR AND CREDITOR. See CREDITOR'S ACTION. FRAUDULENT CONVEYANCES, 1, 2, 3. PLEDGE, 1, 2, 3.

DEED.

1. Recitals in a deed, showing that the consideration thereof was the payment by the grantee of a small mortgage and the support of the grantor during life and her decent burial when dead, constitute conditions subsequent, for a breach of which the grantor may re-enter and take possession, and will thereupon become re-vested with the title. *Gilchrist v. Foxen,* 428

2. Every person acquiring any right, title, or interest, by deed, mortgage, or otherwise, in premises conveyed by a deed, which has been duly recorded, containing such recitals, takes subject to them, and the rights of the grantor are paramount. *Ibid.*

3. Where land, purchased for a married woman and paid for out of her separate estate, was, without her knowledge or consent, conveyed to her husband, but was, on her discovering that fact two days later and demanding a deed in her own name, conveyed by her husband to her, *held,* that the deed to the husband conveyed

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only the bare legal title, and he held merely in trust for his wife, and that the lien of a prior judgment against him did not attach thereto; and that his conveyance to his wife executed the trust and passed the title as of the date of the original deed to him. *Davenport v. Stephens*, 456

DEMAND. See NEGOTIABLE INSTRUMENTS, 1.

DISCRETION. See APPEAL, 24. COSTS, 2, 3. FORECLOSURE, 4. PRACTICE, 4.

DISORDERLY HOUSE. See CRIMINAL LAW, 2.

DOWER. See WILLS, 3.

DRUNKARDS. See CONSTITUTIONAL LAW, 2.

DURESS.

A mere threat, by the father of a girl of the age of fifteen years, to prosecute criminally a married man who had unlawfully caused her to become pregnant, unless he would give a note and mortgage to provide for the care of her and her child, does not constitute duress which will avoid the securities given by him in compliance with the demand, where it appears that he did not execute them until several days after the threat and after he had consulted with friends, who advised him to settle. *Wolff v. Bluhm*, 257

EJECTMENT. See TRESPASS.

ELECTION OF REMEDIES. See APPEAL, 2. TRESPASS.

EMINENT DOMAIN.

The construction and operation, on a public street, of an electric railroad extending between several cities or towns, for the transportation of merchandise, personal baggage, mail, and express matter, as well as passengers, is not a mere exercise of the public easement previously acquired by the establishment of such street, but imposes an additional burden thereon, and is a taking of private property, for which the abutting owner is entitled to compensation. *Chicago & N. W. R. Co. v. Milwaukee, R. & K. E. R. Co.* 561

EQUITY. See CREDITOR'S ACTION. PARTIES. SPECIFIC PERFORMANCE. SURETY.

ESTOPPEL. See PARENT AND CHILD, 3. RECEIVER, 1.

EVIDENCE.

See APPEAL, 20. ATTACHMENT. CONVERSION. COURT AND JURY, 1, 2. CRIMINAL LAW, 1, 4, 5. FRAUD. MILWAUKEE, CITY OF, 4. NEGLIGENCE, 1, 2, 3. PLEADING, 2. PRACTICE, 7. REPLEVIN, 3. WILL, 1, 4, 5.

1. In an action to recover a broker's commission on the sale of real estate, evidence of another broker as to the terms upon which the defendant had told him he might sell the property was inadmissible. *Oliver v. Morawetz*, 1

2. Letters written to a medicine company by its patrons, stating how a newspaper article was understood by them and its effect upon readers in their vicinity, were not admissible in evidence in an action for the libel contained in such article, being mere hearsay. *Dr. Shoop Family Medicine Co. v. Wernich*, 164

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3. The burden of proof that the loss of insured property was caused by the neglect or misconduct of the insured in reference to saving the property is on the insurance company setting up that defense. *Wolters v. Western Ass. Co.* 265

4. Information acquired by a physician or surgeon in attending upon a patient in his professional capacity, and necessary to enable him to treat such patient, is privileged. The object of the provision of sec. 4075, R. S., that no physician or surgeon shall be *compelled* to disclose such information, was to protect the patient, and, construing that section according to its spirit and intention, a physician can neither be *compelled* nor *allowed* to disclose such information in court without the consent of the patient. NEWMAN, J., dissents. *Boyle v. N. W. Mut. R. Asso.* 312

5. In an action for the price of sleds alleged to have been sold by M. to Q. on his representation that he was authorized by T., deceased, of whom the defendant is administratrix, to buy them in his name, he giving an order on T. for the price, *held*, that letters written by T. to M. after he had been notified of the purchase, in the first of which he asked for time for payment, in the second of which, written four months later, he promised to send the money soon, and in the third, some two months later, he asked M. to come to his place if Q. had not paid for the sleds, and they would determine what should be done, though not constituting any part of the contract, were competent evidence as to Q.'s authority to buy the sleds on the credit of T., to be considered by the jury for what they were worth in connection with all the other evidence. *Millerd v. Thompson*, 343

6. In an action for services rendered an order given by the defendant to the plaintiff on a third person for the amount due, if not paid, is not admissible as evidence of a settlement. *Cliver v. Heil*, 364

7. Where the defense to an action on a policy of fire insurance is that the plaintiff set the fire which consumed his property a wide range of circumstances may be given in evidence, tending to show the whereabouts of the plaintiff at the time of the fire, and what motives might have induced him to set the fire. *Agnew v. Farmers' M. P. F. Ins. Co.* 445

EXCISE.

See MANDAMUS. STATUTES.

Where the chairman of a town board of supervisors hired a minor to buy whisky from a licensed vender, for the purpose of obtaining evidence of his selling liquor to minors, *held*, that such chairman was disqualified from sitting as a member of the board in investigating the matter and revoking the license of such vender, and the action of the board in that matter, he acting as a member, was null and void. MARSHALL and NEWMAN, JJ., dissenting, *hold* that a permit to sell intoxicating liquor is not a vested property right, nor entitled to constitutional protection as such; and that a supervisor who, in the discharge of his duty as such, files a complaint, is not disqualified from acting on the board in investigating and deciding upon the charges. *State ex rel. Getchel v. Bradish*, 205

EXEMPTION FROM TAXES. See TAXATION, 1, 2, 4, 5.

FENCES. See RAILROADS, 3, 4.

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FORECLOSURE.

1. Where it appeared, on a motion to set aside a sale on foreclosure, that intending bidders had been misled to the prejudice of the defendants by statements of the sheriff prior to the sale, and led to believe that successful bidders would not be required to make immediate full payment in cash, and that upon a resale the premises would bring a larger sum than the amount due on the judgment. *held*, that it was not an abuse of discretion to set aside the order confirming the sale, and to order a resale, on a sufficient bond being given to secure responsible bidding of such higher price. *Koop v. Burris*, 301

2. Even though the grantor in a deed which is liable to be defeated by breach of a condition subsequent is made a party to an action to foreclose a mortgage given by his grantee, his rights cannot be affected by the judgment therein. The provision of sec. 3169, R. S., that a judgment in foreclosure shall be "a bar to all claim, right or equity of redemption in the mortgaged premises against the parties to the action, their heirs," etc., must be understood as referring to such rights and interests as were or might properly have been litigated in the foreclosure action, and not to such as are paramount. *Gilchrist v. Foxen*, 428

3. The holder of a mortgage which is subject to the paramount rights of the grantor of the mortgagor may foreclose the same and sell the premises under the judgment for the purpose of perfecting his title of record, notwithstanding he may have obtained a deed of the paramount title, and his rights as plaintiff in the foreclosure action will not become merged in his legal title. Yet, as a condition of relief against the purchaser at the foreclosure sale, he may properly be required to pay back the money received on such sale, with interest. *Ibid.*

4. Our statute (sec. 3162, R. S.) requiring that a judgment for the plaintiff in an action to foreclose a mortgage shall fix the amount due and "adjudge that the mortgaged premises be sold for the payment" thereof, is mandatory, and leaves to the court no discretion to enter a judgment in the alternative form. *Spengler v. Hahn*, 472

FRANCHISE. See STREET RAILWAYS, 1, 2, 3.

FRAUD.

See APPEAL, 18. INSTRUCTIONS TO JURY, 6. PLEADING, 7.

Neither an accidental remark by a merchant that he "considered himself worth from $10,000 to $20,000 clear," made in conversation with the agent of a manufacturer but not connected with any negotiations or sales (being simply the expression of an opinion), nor the statement of the merchant at the time of making a subsequent purchase that he would discount his bills the following January (being a mere promise), even though false, could form the basis of an action to reclaim goods subsequently sold, on the ground of fraud. *Louis F. Fromer & Co. v. Stanley*, 56

FRAUDULENT CONVEYANCES.

See CREDITOR'S ACTION, 2.

1. A purchase of notes from a bank by a depositor, he paying therefor with his check on such bank, though made but a few days be-

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fore the failure of the bank, will not be held fraudulent in an action by the assignee of the bank to recover such notes, if the transaction is proved to have been conducted in good faith on the part of the purchaser, without knowledge of the insolvent condition of the bank, or of any fraudulent intent on the part of its officials, and without notice of any facts which should have put them upon inquiry. *Piening v. Endress*, 242

2. A conveyance by a father to his children of all his land, including his homestead, the whole of which is heavily incumbered by mortgage, they paying a full and adequate consideration for his equity of redemption therein, is not rendered fraudulent as to creditors of the father by the fact that they also agreed to support him during life. *Torrey Cedar Co. v. Eul*, 615

3. The fact that a judgment note was obtained for the purpose of entering judgment and levying execution on the property of the debtor does not render the note fraudulent. *Geilfuss v. Corrigan*, 651

GARNISHMENT.

1. A mere verdict against the defendant in an action for personal injury does not make the liability absolute, which is essential to render it subject to garnishment. To become so liable a judgment is necessary. *Lehmann v. Farwell*, 185

2. An agreement by a mortgagee of lands to discontinue foreclosure proceedings commenced by him, in consideration that the mortgagor should turn over to him the rents of such lands to be applied on the debt, in pursuance of which such foreclosure was discontinued, and the mortgagor directed his agents for the collection of the rents to pay over the same to the mortgagee when collected, and they credited such rents to the mortgagee on their books, is *held* to constitute a valid equitable assignment of such rents, and they were not subject to garnishment in the hands of the agents in favor of a judgment creditor of the mortgagor. *Baillie v. Stephenson*, 500

GUARANTY.

Certain persons, all but two of them being stockholders in the W. Mfg. Co., signed an instrument which, after reciting that the W. Mfg. Co. was indebted to the W. M. & F. I. Co. Bank in a certain sum, and might thereafter become indebted in additional amounts, and expressing a consideration, proceeded as follows: "We and each of us do hereby agree upon demand to pay to said . . . bank all loans, drafts, overdrafts, indorsements, accounts, checks, notes, interest, demands, and liabilities, of every kind and description, now owing, or which may hereafter become due or owing, by said W. Mfg. Co. to said . . . bank. It is understood that we each waive notice. . . . This is a continuing guaranty. It is understood that we are to pay any sums which may accrue hereunder in the proportion which the amount of stock now held by each of us in said company bears to the whole amount of capital paid in by said company." In an action on such guaranty, *held*, that whatever might have been the intention of the signers, they had all of them in legal effect bound themselves jointly and severally to the bank for the entire indebtedness of the W. Mfg. Co., and not simply in severalty for an amount proportioned to the

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stock held by them; and that the latter clause could only have effect as fixing a rule of contribution among themselves. *Wisconsin M. & F. Ins. Co. Bank v. Wilkin*, 111

GUARDIAN.

1. The direction of the county court upon the settlement of the accounts of a guardian has the force and effect of a judgment, and is conclusive of the rights of the parties. It bars any defense by the guardian to a subsequent action for the amount ordered by the court to be paid to the ward upon such settlement. *O'Connor v. Decker*, 202

2. A guardian who deposits the trust funds in a bank must, if he wishes to protect himself from loss by a failure of the bank, make such deposit as of trust funds of the specific trust to which they belong. It is not sufficient that he take for them a certificate of deposit in his name with the abbreviation "Guar." following it, that not being equivalent to the word guardian, nor does it show for what ward the deposit is made by him as guardian. *Ibid.*

3. In a proceeding under sec. 4587*b*, S. & B. Ann. Stats., to remove a child from the custody of his parents, guardian, etc., on proof that the physical or moral welfare of the child is endangered by the neglect, abuse, etc., of such parent, etc., and to provide him a home elsewhere, the county judge acts as a mere magistrate, and not as a court; and his order in such a proceeding is no bar to the exercise by the circuit court of its general equity jurisdiction over infants by appointing another person as guardian and awarding to him the care and custody of the infant. Such action by it involves no conflict between courts of concurrent jurisdiction in the matter of appointing guardians. *In re Guardianship of Gertrude Klein*, 246

GUARDIAN AD LITEM. See PARTIES, 2.

HIGHWAYS.

See MILWAUKEE, CITY OF, 1, 2.

1. In an action for a personal injury caused by the presence of an old stump eighteen inches high, about eight and one-half feet west from the center of the highway, which had been there eighteen years, it appeared that the plaintiff, who lived on that highway and not far off and knew of the stump, was driving past there on a track west of that which the town authorities had graveled, in the nighttime, forgetful of the stump, when her wheel struck it and she was tipped over and injured. *Held*, that the question whether the presence of the stump there was such negligence as made the town liable for her injury was properly left to the jury. *Hinkley v. Town of Rosendale*, 271

2. Although the person suing for an injury caused by a defect in a highway, such as a dangerous gully or ditch extending across it, was not actually thrown out and injured until his horses had become frightened on passing through it and had been running for some distance therefrom, yet, if such defect was the cause of the horses running away, it may well be held to have been the proximate cause of the injury. *Donohue v. Town of Warren*, 367

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3. A notice of injury and a complaint therefor which designate the place where the accident happened as being "in the highway running between sections three and four in the town of W. at a point about four hundred feet north of the southwest corner of the northwest quarter of section three," are sufficient in that respect, if the defect causing the accident was so near to the point designated as not to cause any material variance. *Ibid.*

HUSBAND AND WIFE. See INSURANCE, 2.

INJUNCTION. See TAXATION, 4.

INSTRUCTIONS TO JURY.

See CRIMINAL LAW, 6–8.

1. When instructions are requested which are correct in law and applicable to the case, the court should give them without modification, and to refuse to do so is error, unless they are substantially given in the general charge. *Guinard v. Knapp-Stout & Co. Company,* 482

2. Thus, after giving an instruction in an action for an injury, by unguarded machinery, substantially as requested, that, "if the jury find that the defendant furnished to the plaintiff a place to work which was as safe and free from danger as other persons of ordinary care in like business and under like circumstances ordinarily furnish, they must find for the defendant," to modify such instruction by adding that "they should not so find if the places provided by such other employers of labor for their workmen or servants are not reasonably safe," has the effect to pervert the force and destroy the meaning of the instruction and leave the jury without a standard by which to test the defendant's liability. *Ibid.*

3. The test of negligence in such a case is the presence or absence of that degree of care which ordinarily prudent persons are accustomed to observe about the same or similar affairs in similar circumstances. *Ibid.*

4. In such an action, to instruct the jury in a general way that a preponderance of evidence is necessary to justify a verdict for the plaintiff, and then to add, "You cannot find for the plaintiff unless his evidence outweighs that of the defendant. . . . If the plaintiff has proved his case by a fair preponderance of evidence,— if plaintiff's evidence weighs enough more than that of defendant to turn the scale on the plaintiff's side, even if it be but little, if that little be perceptible,— your verdict will then be for the plaintiff," is calculated to puzzle and mislead the jury. *Ibid.*

5. To instruct the jury in such a case that, "If you find for the plaintiff you will bring in such damages as will make him whole in dollars, as far as possible," is misleading, in that it suggests greater damages than are given by the just rule, i. e. "such sum as will fairly compensate for the damages suffered and is reasonable in amount." *Ibid.*

6. A refusal by the court to instruct the jury, as requested, that the defendant could not obtain a rescission of the contract for false representations nor recover on the counterclaim for money paid on such contract, if by the exercise of diligence he might have discovered their falsity, or if he failed to exercise his right to rescind within a reasonable time after the discovery, *held,* not to be error, where the general charge gave that instruction in substance. *South Milwaukee B. H. Co. v. Harte,* 592

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7. For the court to state in its charge in an action on an insurance policy that the only issue for the jury is whether the plaintiff set or caused to be set the fire which consumed his buildings, and that all other matters claimed in the complaint stand admitted as true if the plaintiff is entitled to a recovery, cannot prejudice the plaintiff. *Agnew v. Farmers' M. P. F. Ins. Co.* 445

8. It was not error for the court to state in its charge what the defendant claims as to the plaintiff's motives in purchasing the insured property, and that "whether he was actuated by such motives is a disputed fact. He denies it. It is for you to determine whether such facts existed." *Ibid.*

9. It was not error for the court to refuse to charge, as requested by plaintiff, that the defense must be established by a preponderance of the evidence *given in court*, where that point was fully covered by the general charge. *Ibid.*

10. In an action for an injury caused by negligence as to blocking a guard rail, there being evidence which, if believed, might have sustained a finding that the injuries of the deceased occurred in consequence of his stumbling against the arm of the guard rail and then slipping, it was error for the court to refuse to charge the jury that if the injuries were received in that way the plaintiff could not recover, unless the same point was clearly given in the general charge. *Curtis v. C. & N. W. R. Co.* 460

11. In an action, by a married woman to recover a piano claimed to have been given her by her husband before marriage, it was not error for the court to charge the jury to the effect that the transaction on which the plaintiff based her claim to the piano was not strictly one between husband and wife, yet the same principle prevails as if they had been; such instruction being favorable to the appellant. *Williams v. Hoehle,* 510

12. An instruction to the effect that the jury must take the testimony as it was,—credible and false,—and if they found the *burden of proof* in favor of the plaintiff, they must find for her,—the words *burden of proof* being evidently used through inadvertence instead of *preponderance of evidence,*—is *held* not calculated to have misled the jury to the prejudice of the appellant. *Ibid.*

13. An instruction that possession "for certain purposes makes a *prima facie* ownership," and that the jury should consider that fact with the other evidence and give it such force as it ought to have in reaching a conclusion, is *held* to have been favorable to the appellant. *Ibid.*

14. In determining whether the instructions given to the jury were correct and sufficient, the charge is to be construed as a whole and not by detached sentences. *Hinkley v. Town of Rosendale,* 271

INSURANCE.

See WAIVER, 2.

Life. See BENEFIT SOCIETY, 1–4.

1. One who effects an insurance on his own life in a mutual life insurance company organized under ch. 1, Laws of 1887, may, under the provisions of sec. 14 of that chapter, assign his certificate to any person other than the beneficiary named therein, without any reference to such beneficiary, whether his assignee has any insurable interest in his life or not. *Strike v. Wis. Odd Fellows M. L. Ins. Co.* 583

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2. This right of a person who insures his own life to assign the certificate is not affected by sec. 2347, R. S., as amended by ch. 376, Laws of 1891, authorizing any person to insure his life for the benefit of a married woman, and making such insurance her sole and separate property, free from the control of her husband and from the claims of his creditors. *Ibid.*

3. The restriction of such assignments to persons having an insurable interest, by ch. 20, Laws of 1895, cannot apply to insurances previously assigned. *Ibid.*

Fire. See EVIDENCE, 3, 7. INSTRUCTIONS TO JURY, 7-9.

4. If policies of insurance have been delivered to the insured without prepayment of the premiums, and credit given therefor, they must be held to be in force, subject to the right of the insurer to cancel them by notice. *John R. Davis Lumber Co. v. Home Ins. Co.* 542

5. There is no presumption that an agent to procure insurance policies has authority, after he has procured and delivered them to the insured, to receive notice of cancellation and to surrender and discharge the same, but in an action on such policies that is a question for the jury. *Ibid.*

6. A fire insurance policy, issued in the form prescribed by ch. 195, Laws of 1891, before that act was declared unconstitutional, must be regarded as depending for its validity and construction wholly upon the consent of the parties. *Flatley v. Phenix Ins. Co.* 618

7. Where a policy clearly specifies numerous grounds of invalidity or forfeiture, but does not include among them the "failure to furnish satisfactory proofs of loss" within sixty days after its occurrence, as stipulated in such policy, the courts will not raise a forfeiture by implication from such failure, but will hold the effect thereof to be simply to postpone the time for payment of the loss until the expiration of the time stipulated therefor after such proofs are furnished. *Ibid.*

8. A condition in a policy of insurance that, unless by agreement indorsed thereon, such policy shall be void "if any change, other than by the death of the assured, take place in the interest, title or possession of the subject of the insurance (except change of occupants, without increase of risk), whether by legal process, or judgment, or by voluntary act of the insured, or otherwise," is broken and the policy is rendered void by the voluntary assignment of the insured property by the insured for the benefit of creditors, and possession by the assignee, without the consent of the insurer, even though such assignment is void as to creditors for fraud, or for noncompliance with the requirements of the statutes on that subject. Such assignment, though void as to creditors, is valid as to all others. *Milwaukee Trust Co. v. Lancashire Ins. Co.* 193

9. Although sec. 1977, R. S., declares that whoever solicits or procures insurance from an insurance company on behalf of another, or makes any contract for insurance, or collects any premium, etc., shall be held to be an agent of such insurance company "to all intents and purposes," it cannot be construed to prevent an insurance broker employed to procure insurance for another from being the agent of the assured at the same time in procuring the policy; and the same rule applies as in other agencies, that the principal is bound by the acts and representations of the agent within the

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scope of his authority. Where the two relations conflict, the statute must prevail. *John R. Davis Lumber Co. v. Hartford F. Ins. Co.* 226

10. An agreement made by an insurance broker, when procuring insurance from certain agents of insurance companies, that his principal should not take or accept additional insurance in the same companies from other agents thereof, is binding upon the principal, he knowing it to be the policy of insurance companies to limit the amount of insurance to be carried by them respectively on such property, even though he had no notice of such agreement until after the first loss; and if the assured then, with full knowledge of all the facts, insists upon taking the benefit of the policies procured in violation of that agreement, he thereby ratifies the same, whether originally authorized or not. *Ibid.*

11. Where additional policies were procured by the assured in violation of the agreement of such broker, and the insurance companies, after the first loss, insisted upon recalling, revoking, and unmaking the first contracts of insurance, and treating them as if they had never been in force, and claiming that they were wholly inoperative from the beginning, as by tendering back the whole amount of the premiums, demanding a return of the policies, and keeping the tender good, they cannot be held to have waived such agreement. *Ibid.*

12. A notice of cancellation served on the broker who, as agent for the assured, procured the policies, after his agency had ceased, is ineffectual. *Ibid.*

13. The right to cancel a policy exists only by contract, and the provisions of the policy conferring such right must be strictly complied with in order to effect a cancellation. There must be an actual notice of cancellation, not a mere notice of a desire to cancel or a notice that the policy will be canceled, or a notice to cancel, and it must be served on the proper person, and a tender made of the unearned premium. A tender and demand for a surrender of the policies, made for the purpose of a rescission or cancellation from the beginning and refused on that ground, cannot operate as a sufficient tender to effect a cancellation. *Ibid.*

14. If, by reason of the neglect of the insured to use all reasonable means to save and preserve the property at and after the fire, or of his interference preventing or obstructing the saving of the personal property, any of it is destroyed, such conduct on his part is a defense to an action on the policy to the extent of the value of the property lost in consequence thereof, although there is no stipulation or condition in the policy making that a ground of forfeiture. *Wolters v. Western Ass. Co.* 265

JOINT LIABILITY. See GUARANTY.

JUDGMENT. See GARNISHMENT, 1. GUARDIAN, 1. NOTICE. PRACTICE, 8.

JURISDICTION. See GUARDIAN, 8.

JUSTICE OF THE PEACE. See CRIMINAL LAW, 1.

LANDLORD AND TENANT.

See LEASE.

1. A landlord who, though not required by the lease to make repairs, undertakes at the request of his tenant to put a new roof upon the leased building, is bound to use reasonable care and skill to

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prevent injury by the elements to the property of his tenant therein while engaged in removing the old and putting on the new roof, and is liable for any such injury caused by the want of such care and skill, notwithstanding his undertaking was without consideration. *Wertheimer v. Saunders*, 573

2. In such a case, where injury occurs to the tenant's property in the building from rain through the uncovered roof, the landlord cannot escape liability therefor on the ground that it resulted from the failure of the persons who had undertaken the job, as independent contractors, to exercise reasonable care to avoid such injury. *Ibid.*

LEASE.

A provision in a lease for an office of a corner room facing on both W. and J. streets in a building at the intersection of those streets, that "if the lessor should, during the term of this lease, rent any office on either the W. or J. street front, for a less rate than . . . one dollar per square foot on the J. street front, or one dollar and twenty-five cents on the W. street front, or one dollar and fifty cents per square foot on corner rooms located on the corner of W. and J. streets, . . . such reduction shall also be made to the lessee for the term of this lease, . . . this agreement shall not apply to any room not specially mentioned," is to be construed as dividing the rooms into three classes, and making the reduction of the lessee's rent to depend upon the lessor's reducing the rent on rooms of the same class, that is, on corner rooms. *Goldsmith v. Southwell*, 176

LIBEL.

The publisher of a newspaper on receiving a proposed advertisement of certain family medicines published in his paper an article in the form of a letter addressed to the proprietor of such medicines, saying, "Your advertisements will not be received in the columns of the L., although you offer us big pay. We have repeatedly advised our readers that by the manufacture and sale of such medicines the public are swindled out of their money." *Held*, that the article was libelous *per se*. *Dr. Shoop Family Medicine Co. v. Wernich*, 164

LIEN. See VENDOR AND PURCHASER.

LIS PENDENS. See NOTICE OF LIS PENDENS.

MALPRACTICE. See PLEADING, 8.

MANDAMUS.

1. Under sec. 1559, S. & B. Ann. Stats. (providing that if upon the hearing of a petition for the revocation of a license to sell intoxicating liquors "the board shall find the complaint to be true, *the license shall be revoked*, and if untrue the proceedings shall be dismissed," etc.), the board is bound to find the complaint true or untrue according to the evidence; and if the undisputed evidence and admitted facts establish its truth the board may be compelled by *mandamus* to revoke the license, even though a majority have voted that the charges were untrue. *State ex rel. Buchanan v. Kellogg*, 672

2. Where it appears from the relation for a writ of *mandamus* in such a case that the undisputed evidence showed the charges of the

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complaint to be true and it is alleged that the council wilfully, unreasonably, persistently, and negligently refused to revoke the license, and wilfully and unreasonably abused their power and authority, a return alleging merely that there was conflicting testimony on the trial and that the majority voted that none of the charges of the complaint were true, but not otherwise denying the allegations of the relation or indicating upon what particular facts the testimony was conflicting, is in effect an admission of the truth of the relation, and the peremptory writ should be awarded. *Ibid.*

MARRIED WOMAN.

See INSURANCE, 2.

1. In the absence of an enabling act, the contracts of a married woman are cognizable only in equity. Except as affected by the so-called "married women's act" (secs. 2342–2345, R. S.), such contracts cannot be enforced at law. *Mueller v. Wiese,* 381
2. By the provisions of that statute, only contracts which relate to or are necessary or convenient for the use and enjoyment of a married woman's separate estate, or the carrying on of her separate business, or which relate to her personal services, can be enforced at law. An action at law is not, therefore, maintainable against a married woman on a note signed by her solely as surety for her husband. *Ibid.*

MASTER AND SERVANT.

See INSTRUCTIONS TO JURY, 2. PRACTICE, 7.

1. A protest by an employee against continuing in the employment of the master because of some special risk attending it; a promise by the master to remove the danger within a reasonable time; and a continuance of such employment in consideration of such promise,—relieve the employee from the charge of contributory negligence, if injured because of such danger within such time, unless the risk is so obvious and immediate that serious injury may probably result from a continuance of the work. *Erdman v. Illinois Steel Co.* 6
2. The "shift boss" in a mine, whose business it is to direct miners where to work, in performing that duty acts in the capacity of master or vice-principal, and if such boss knows of a concealed danger, such as an unexploded blast, at the place where he sets a miner at work, of the existence of which the latter is ignorant and unable with ordinary care to ascertain, and does not inform him thereof, the master is liable for an injury to such miner caused thereby. *McMahon v. Ida Mining Co.* 308
3. If a brakeman of considerable experience, who has had his attention called to and has read a printed notice issued by the railroad company employing him and conspicuously posted about its depot and yards, warning brakemen that extra care is necessary in coupling cars loaded with lumber which projects beyond the end of the car (a not unusual way of loading them), to prevent the hand, arm, or body from being caught by such lumber, attempts to couple an engine to a freight car so loaded with projecting lumber and is crushed in the attempt, he must be held to have assumed the risk, and no recovery can be had for his death. *Nash v. Chicago, M. & St. P. R. Co.* 327

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4. If a minor son, living with his father, having been directed by the latter to take his gun with him to the cornfield and to shoot crows there when he had spare time, and promised ten cents apiece for all he should kill, instead of remaining in such cornfield goes off his father's premises hunting other game, and, when several miles away, by his negligence in handling his gun injures another person, the father is not liable therefor, because the son was not at the time of the accident in his father's employ or in any sense his servant for such purpose. *Winkler v. Fisher,* 355

5. A laborer, engaged in shoveling gravel from a gravel pit, who, having knowledge of the liability of the gravel on the face of the pit to fall down as excavation proceeded at the bottom, and of the fact that blasting was being resorted to in order to break off the frozen surface, continues to work in the pit, must be held to have assumed the risk of injury from the falling of the bank at the place where he was working, as incident to his employment, and he cannot recover from his employer for an injury caused thereby. *Larsson v. McClure,* 533

6. In an action for a personal injury to a foreman in the defendant's sawmill, caused by the breaking of a nut which supported the sleeve or covering of the band-saw, thus letting such sleeve fall upon the plaintiff's hand, which he had put under such sleeve to examine the machinery instead of using the manhole provided for that purpose, which was safe, the jury by special verdict found that the nut was broken prior to the accident; that with it so broken the machine was not reasonably safe for use in the mill; that its condition could have been discovered by the defendant by the exercise of ordinary care; and that the plaintiff was not negligent. *Held,* that such verdict would not support a judgment for the plaintiff, for the reason that it failed to find that the use of the machine in that condition was negligence as against the plaintiff, or that such negligence was the cause of the accident. *Rysdorp v. George Pankratz Lumber Co.* 622

7. Such verdict was also inconsistent in that it, in effect, held the defendant to a higher degree of care as to its machinery than the plaintiff, on whom it relied as an expert. *Ibid.*

8. Upon the evidence, the defendant was free from negligence, but the plaintiff must be held to have been guilty of negligence in putting his hand under the sleeve to do work there instead of using the manhole which had been provided by the defendant, where it would have been safe, and, knowing the danger, he by so doing assumed the risk. *Ibid.*

9. By retaining in his service a servant, hired for a term to perform work requiring reasonable skill and diligence, after knowledge of the defective quality of his service, and by paying him the stipulated wages in proportion to the time he has worked without objection on that account, the master may waive such breaches of the contract as relate to the quality of the service. His doing so is at least *prima facie* evidence of such waiver. *Tickler v. Andrae Mfg. Co.* 352

10. In an action by the servant to recover wages for the balance of the term, on the ground of a wrongful discharge, he is not entitled to have his expenses in seeking other employment deducted from the credit to be allowed the master on account of wages earned elsewhere. *Ibid.*

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MAXIMS.
Caveat emptor, 94.
Ex dolo malo actio non oritur, 137.
In pari delicto potior conditio defendentis, 299.
Potior conditio defendentis, 137.

MILWAUKEE, CITY OF.

See TAXATION, 5.

1. Under the charter of Milwaukee (Laws of 1874, ch. 184, subch. VII, sec. 8) giving the owner of land affected by the change of the grade of any street a right to compensation therefor, where such change was made after a permanent grade had been established and "after such street shall have been actually graded to such established grade," the actual grading of the street to the grade first established is a condition precedent to the right to recover damages occasioned by the change. *Walish v. City of Milwaukee,* 16
2. Where the change of grade in a street by reason of the construction of a viaduct therein is made under authority of law and with due care, the municipality is not liable for *consequential* injuries to abutting property, unless made so by statute or the constitution. *Colclough v. Milwaukee,* 92 Wis. 182, followed. *Ibid.*
3. Under the charter of the city of Milwaukee, where an established grade is altered in the improvement of a street, the contractor's certificate therefor is absolutely void unless it affirmatively appears on its face that the damages from the change of grade were considered by the board of public works in making the assessment. *Liebermann v. Milwaukee,* 89 Wis. 336, followed. *Saunderson v. Herman,* 48
4. Where special assessment proceedings are absolutely void on their face for failure to comply with the charter, it cannot be shown by extrinsic evidence that the charter provisions have been complied with. *Ibid.*

MUNICIPAL CORPORATIONS.

See CRIMINAL LAW, 2. DAMAGES, 1. MILWAUKEE, CITY OF, 1–3. OSHKOSH, CITY OF. STATUTES. STREET RAILWAYS, 3.

1. While the state has delegated to cities the authority to act for it and on its behalf in granting franchises to build and operate street railways, it has not granted to them the power to institute and maintain actions to forfeit such franchises for misuse or abuse. Such a forfeiture cannot therefore be decreed in a suit in equity brought by the city, but must be adjudged by action in the name of the state under sec. 3241, R. S. *Milwaukee Electric R. & L. Co. v. City of Milwaukee,* 89
2. A city council may lawfully, by ordinance, authorize police officers to arrest without warrant persons engaged in their presence in a breach of the piece, i. e. a disturbance or violation of public order; and an officer who from the outside of a house hears a disturbance or disorderly conduct within it may, acting in good faith under such authority, enter the house and arrest the person guilty thereof as being an inmate of a disorderly house. *Hawkins v. Lutton,* 493

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NEGLIGENCE.

See COURT AND JURY, 1. HIGHWAYS, 1. INSTRUCTIONS TO JURY, 2, 3, 10. LANDLORD AND TENANT, 1, 2. MASTER AND SERVANT, 1–8. PRACTICE, 7. RAILROADS, 1, 5, 7, 8.

1. The danger of a saw, four feet in diameter with a crack three inches from the outside, flying to pieces when let down upon large bars or plates of iron while running at a speed of 1,700 revolutions per minute with sufficient force to cut the bars or plates in two, is *held* to have been so obvious, immediate, and constant that an employee engaged in operating it was guilty of negligence in continuing at his work with knowledge of the defect, even in reliance upon the promise of the master to remedy it; and the unsupported testimony of the employee, thirty-five years old and of fourteen years' experience with machinery, that he did not know of the existence of such danger, is insufficient to support a finding of the jury that he neither knew nor ought to have known of it. *Erdman v. Illinois Steel Co.* 6

2. The testimony of the employee in such case that he asked his vice-principal if he would change the saw; that he did not know that he objected to going to work, or that any one did; that he was paid by the ton and would have lost a part of a day's work if he had not commenced at that time; and that he asked if the saw was to be changed because he wanted to change his coat,—is *held* to show that the employee did not object to going to work with the defective saw. *Ibid.*

3. In an action for an injury to a boy two years and seven months of age, by being run over by a street car, the evidence showed that, in some unknown way, he escaped from the yard at his home and started to cross the street in which the railway ran,—at first going behind a coal wagon moving north, and then passing from behind it towards home; that he was struck and injured by a street car about one hundred feet south from the coal wagon and fifteen to twenty feet west from the line of the wagon; that there was nothing within that distance to obstruct the vision of the motorman except one trolley post; that the boy was clearly seen by passengers on the car from the time that he started to cross the street, both before and after he was behind the coal wagon; and that the motorman's attention was called to the boy when he was about fourteen feet from the car, but he did not put on the brake. *Held*, that there was sufficient evidence to support the finding that the motorman ought to have seen the boy in time to have avoided the accident, notwithstanding he testified that he did not see him until he was going under the wheels; and also to sustain the finding that the boy's mother was free from contributory negligence. *Slensby v. Milwaukee St. R. Co.* 179

4. Where, in an action against a railroad company for causing the death of a switchman by its negligence in not keeping a guard rail properly blocked, there was evidence that the defendant was guilty of negligence in that respect, and that in consequence thereof the switchman caught his foot between the guard rail and the track rail, which caused him to fall under the cars, and there was no evidence on which it could be held, as a matter of law, that the deceased assumed the risk or was guilty of contributory negligence, *held*, that the court properly refused to take the case from the jury. *Curtis v. C. & N. W. R. Co.* 460

5. It was not negligence *per se* for the deceased to go between the cars while in slow motion, for the purpose of uncoupling them, or to

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use a stone while walking along to loosen the coupling pin, where that had been a common custom in the switchyard, approved by the yard master, even though he might have signaled the engineer to stop the car and then have taken the pin out without danger; nor did he, by choosing the more dangerous mode, assume the risk of injury resulting, not from that cause, but from the negligence of the defendant in respect to the guard rail. *Ibid.*

6. In an action against a railroad company for causing the death of an eight-year-old boy by negligence, there was evidence that at the place where he was killed there was a space between the tracks which was much used by children for play grounds, and a crossing over its three tracks constructed and planked by the railroad company, which was almost constantly used by the people, young and old, to pass from one side of the village to the other, and they frequently crawled under or climbed over trains standing there, without objection by the employees of the company; and that on the day such child was killed a long freight train had been standing over such crossing for nearly an hour, when he attempted to climb between the cars for the purpose of going home, and the train started and killed him, no trainman seeing him,—and there was conflicting evidence in respect to signals. *Held*, that the questions of negligence on the part of the defendant and contributory negligence on the part of the boy were for the jury to determine. *Carmer v. C., St. P., M. & O. R. Co.* 513

NEGOTIABLE INSTRUMENTS.

1. The fact that a note bearing interest payable semiannually was dated, executed, and delivered on a certain day fixes the date for the payment of instalments of interest at the end of every six months thereafter, and no demand was necessary to create a default. *Zautcke v. North Milwaukee Townsite Co. No. 3*, 21

2. If notes when taken were voidable for the fraud of the maker, and the assignee in taking them relied upon the credit of the indorsement, that could not operate as a reservation of any legal interest in the assignor, and he could not lawfully do anything to impair their value in the hands of the assignee, as by electing to declare them void. *Landauer v. Espenhain*, 169

NEW TRIAL. See COSTS, 1, 2. PRACTICE, 8.

NOTICE.

See DEED, 2. HIGHWAYS, 3. INSURANCE, 12.

The docketing of a judgment is not notice, at common law, to any body dealing with the judgment debtor, nor is it made so by any statute of this state. *Bartz v. Paff*, 95

NOTICE OF LIS PENDENS.

See APPEAL, 1.

1. One who purchases a tax certificate while a suit is pending to cancel it, to which his vendor is a party, is bound by the judgment in such suit, though no notice of *lis pendens* was filed. The rule of the common law as to purchasers *pendente lite* governs such a case, and is not abrogated by sec. 3187, R. S., relating to the filing of notices of *lis pendens*, but that statute applies only to the cases provided for therein. *Brown v. Cohn*, 90

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2. The filing of notice of *lis pendens* is not necessary where the subsequent purchaser has actual notice, or when he is not a *bona fide* purchaser. The purchaser of a tax certificate is not protected as a *bona fide* purchaser, but he buys it subject to all its defects and infirmities. *Ibid.*

OSHKOSH, CITY OF.

Section 9 of subchapter IV of the charter of the city of Oshkosh (ch. 59, Laws of 1891) provides for the election by the city council of one constable, and his term of office is fixed at two years. Section 19 provides that any alderman when elected by the common council may become a constable,—and that when he ceases to be an alderman he shall cease to be a constable. Section 1, subchapter XXIII, prohibits an alderman from holding any other municipal office except as otherwise provided. *Held*, in an action to try the title to the office of constable, that by a proper construction of these sections of the charter only one constable is provided for, and that an alderman who has been made a constable can hold his office only for two years, and his term as such is not extended by the provision that if, before the end of his term, he ceases to be an alderman his office as constable shall cease. *State ex rel. Hinz v. McKone*, 216

PARENT AND CHILD.

See GUARDIAN, 8. MASTER AND SERVANT, 4.

1. Sec. 3964, R. S., secures to a father, as the natural guardian of his minor child, the right to its care and custody, "if he is competent to transact his own business and not otherwise unsuitable," and the mere fact that its maternal relatives, who have had the care of the child from its birth and have become attached to it and desire to continue to care for it, are able to secure to it better advantages than can its parent, does not render that parent *unsuitable* to have its care and custody, within the meaning of that statute. *Markwell v. Pereles*, 406

2. Nor is the father of the child rendered *unsuitable* by the fact that he is of a somewhat cold, reserved, and unsympathetic nature, or that, by reason of his occupation, he is absent from home the greater part of his time; or that his second wife, in whose care the child is to be in his absence, is young and has had little experience in the care and management of children, so as to authorize the court to deny him the care and custody of the child as against such relatives. *Ibid.*

3. Whether or not the father might, by an oral contract, cede away his parental rights and finally conclude himself in respect to them, yet the mere facts that, when the father, at his wife's funeral, requested to be left alone with her remains, her brothers did not leave the room; that one of them there, in the name of his wife, requested the father to consent that they should have the custody of the child, and, on his remaining silent, asked him to shake hands if he would not speak, and he did take their hands; and that he afterward left the child in their care for twenty-one months, during which time he paid its expenses and constantly claimed the right to its custody, do not establish a surrender on the father's part of his right to the custody of such child. *Ibid.*

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PARTIES.

1. Under the rule of our statute that every action must be prosecuted in the name of the real party in interest, the payee of promissory notes who has transferred the same cannot maintain an action or an attachment for the debt so long as the notes remain in the hands of his assignee, even though, in transferring them, he indorsed them; but in that case, if he afterward pays and takes them up he is remitted to his original rights. *Landauer v. Espenhain*, 169

2. At common law, and in the absence of any statute to the contrary, a person who is weak, feeble-minded, and not of sufficient mental capacity to attend to ordinary business transactions and preserve his property rights, may sue in his own name, without a guardian *ad litem*, to set aside an exchange of property fraudulently procured from him by the defendant. The mere fact that he, in his complaint, acknowledges himself to be so, does not preclude his suing in his own name, nor is there anything in secs. 2615, 2616, R. S., or secs. 3976, 3982, S. & B. Ann. Stats., providing for the appointment of guardians *ad litem* for insane or mentally incompetent persons, to prevent him from doing so. *Menz v. Beebe*, 383

3. One who has the legal title to land, whether in actual possession or not, may maintain an action in equity to remove a cloud affecting the title, where the invalidity of the hostile claim cannot be proved by any record, but must be shown by other evidence. *Davenport v. Stephens*, 456

PARTNERSHIP. See CONTRACT, 7.

PHYSICIAN, Communications to, privileged. See EVIDENCE, 4.

PLEADING.

See MANDAMUS, 2. RAILROADS, 7.

1. Where payment for grading lots was to be made on certificates of the assistant city engineer, the furnishing of such certificates was a condition precedent to the right to demand or sue for the price of the work, and the performance of such condition must be both alleged and proved, or its performance excused, before there can be a recovery. *Boden v. Maher*, 65

2. Where the performance of such a condition precedent has not been alleged in the complaint, the admission in evidence of the engineer's certificates was erroneous. *Ibid.*

3. A complaint for a libel published in the German language, which sets forth the article in German, and alleges that being translated it "reads as follows," giving the alleged translation in words and figures, asserts in substance that the translation is a true one, and is sufficient in that respect. *Dr. Shoop Family Medicine Co. v. Wernich*, 164

4. A complaint, in an action by a mortgagor against his mortgagee to set aside a mortgage given to hinder and delay creditors and a title obtained on foreclosure thereof, is bad on demurrer if it does not show that the execution of such mortgage was procured from the plaintiff by the fraud of the mortgagee. The mortgage may be valid as between the parties, though fraudulent as to creditors. *Krouskop v. Krouskop*, 296

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5. Where the complaint sets forth certain promises by the mortgagee to dispose of the property and pay the debts of the mortgagor as the inducement by which the execution of the mortgage was procured, it is not sufficient to allege the nonperformance of those promises by the mortgagee, since that does not establish a fraudulent intent at the time of making them. *Ibid.*

6. A complaint, in an action by a town against its former treasurer, which alleges that the defendant was appointed treasurer to fill a vacancy and qualified by giving the statutory bond, setting out the conditions of the bond and the facts constituting a breach thereof, and that the action was duly authorized by the town board of supervisors, *held* to be one on his official bond, and not on his personal liability as treasurer, though his sureties are not made parties. *Town of Cady v. Bailey,* 370

7. A complaint, in an action to rescind an exchange of lands, which alleges that one of the defendants fraudulently induced the plaintiff to exchange lands in Wisconsin for lands in Tennessee, by taking advantage of his mental incapacity and by making false representations as to the quality of the Tennessee lands and the state of the title, and that said defendant had contracted to convey the Wisconsin lands received by him in exchange to the other defendant, who takes them with knowledge of the facts, and that the latter defendant threatens to sell or incumber the lands so as to prevent the plaintiff from collecting any judgment he may obtain, and prays for a rescission of the trade, a reconveyance of the Wisconsin lands, an injunction against any disposition or incumbering of those lands by the defendants, their attorneys, etc., and for damages,— does not misjoin causes of action, but states only one cause. *Menz v. Beebe,* 383

8. A complaint in an action for malpractice, which alleges that plaintiff's leg was broken; that the defendant being at that time a surgeon, the plaintiff employed him as such surgeon to examine such broken leg and ascertain the extent of the injury and to set the same if broken and to treat and heal the same for whatever was the injury to it; that defendant undertook as a surgeon to do so; that he examined said leg in a negligent and unskilful manner and failed to ascertain that the same was broken, or the extent of the injury thereto, and treated and tried to heal the same as though it was not broken; and that by reason of the defendant's negligent and unskilful examination and treatment plaintiff was made sick and kept from attending to his business and suffered much pain, etc., *held,* to contain in substance all the necessary averments. *Crowty v. Stewart,* 490

9. The objection that the complaint misjoins causes of action which do not "affect all the parties to the action" can, under sec. 2649, R. S., be raised only by a demurrer on that ground, and if not so raised it is waived. Neither a general demurrer on the ground that the complaint fails to state a cause of action, nor a demurrer *ore tenus* at the trial, is sufficient for that purpose. *John R. Davis Lumber Co. v. Home Ins. Co.* 542

[10. The question of the validity of ch. 235, Laws of 1893, allowing the joinder of independent causes of action, not decided.] *Ibid.*

11. The failure of the plaintiff in an action to recover lands sold for taxes, conveyed to the state and again sold, to deposit the amount of such taxes as required by ch. 278, Laws of 1883, as a condition of maintaining his suit is matter in abatement. If it appears on the

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face of the complaint it may be taken advantage of by demurrer, otherwise only by plea in abatement, and if not so raised the objection is waived. *Lombard v. McMillan*, 627

12. Under sec. 2657, R. S., a defendant may plead as many defenses and counterclaims as he may have, even though they are based upon inconsistent legal theories. With a defense of fraud for which he seeks a rescission of the contract sued on, and a counterclaim for payments made thereon, the defendant may, therefore, join a counterclaim for breaches of such contract, if held binding. *South Milwaukee B. H. Co. v. Harte*, 592

PLEDGE.

See WAREHOUSE RECEIPTS.

1. Good faith on the part of a pledgee does not render the pledge valid, in the absence of delivery of the possession, either actual or constructive. *Geilfuss v. Corrigan*, 651

2. A furnace corporation engaged in smelting iron ore gave a mining corporation receipts in the form of "storage warrants" on iron stored in its yard in order to raise money without injuring its credit. Both corporations were under the absolute ownership and control of the same person. There was no consideration for the transfer, and no other delivery of the property than the turning over of the warrants, and it was understood that they should be returned whenever the furnace company needed them on account of sales of iron. No specific iron was ever set apart as covered by the warrants, but other iron was piled in the yard as it was manufactured and shipments made therefrom indiscriminately. *Held*, that the mining company acquired no title to the iron as against creditors of the furnace company. *Ibid.*

3. A bank which received such storage warrants in good faith from the mining company as collateral, but which never had any other possession of the iron than that given by the transfer of the warrants and never notified the furnace company of its claim thereto, but permitted the latter to dispose of the iron on hand and substitute other iron in its place,—acquired no lien on the iron as pledgee as against third persons, even conceding that the title thereto passed to the mining company. *Ibid.*

PRACTICE.

See CONSTITUTIONAL LAW, 3, 4. COSTS, 1, 2. COURT COMMISSIONER. WAIVER, 1.

1. The court is not justified in directing a verdict unless, looking at the facts in evidence in the light most favorable to the opposite party, the jury would not be justified in finding a verdict in his favor. *Leiser v. Kieckhefer*, 4

2. In submitting questions of fact to the jury, it is sufficient that the questions proposed by a party are fairly submitted in substance, though changed in form. *John R. Davis Lumber Co. v. Home Ins. Co.* 542

3. The submission of thirty-eight questions to be answered in the form of a special verdict, in a case involving only two or three simple issues, is criticised as tending to confuse and mislead the jury. *Louis F. Fromer & Co. v. Stanley*, 56

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4. Parties should be liberally indulged in the exercise of the right to cross-examine witnesses, so long as anything of value is likely to be brought out; but the court has a large discretion in the matter, and its exercise thereof to shut out unnecessary and useless questions will not be *held* error, where no substantial rights of the appellant appear to have been prejudiced thereby. *McMahon v. Eau Claire Water Works Co.* 640

5. The absence of the trial judge from the court room for any considerable time during the trial of a cause or the arguments to the jury, without the consent of the parties, is a material error, for which the judgment will be reversed and a new trial be ordered. *Smith v. Sherwood,* 558

6. The same rule applies to a motion for a nonsuit made at the close of all the evidence as to one moved for at the close of plaintiff's evidence,— that it should not be granted when the evidence on the part of the plaintiff alone, under the most favorable construction it would reasonably bear, would support a verdict in his favor. *Badger v. Janesville Cotton Mills,* 599

7. Where, in an action against an employer for an injury to an employee, alleged to have been caused by the negligence of the defendant in furnishing to the plaintiff a defective ladder to use in the discharge of his duties, there was testimony on the part of the defense to show that the ladder was apparently sound, and had shortly before the accident safely carried the weight of two men, and in the opinion of an expert would carry 900 pounds of steady weight, *held,* that the reasonable probability was that the ladder broke from some cause other than plaintiff's weight, as testified to by him, and a nonsuit was properly granted. *Milwaukee Masons & Builders' Asso. v. Niezerowski,* 129

8. It is the evident intent of our statute (S. & B. Ann. Stats. sec. 2894*a*) that the attorney for the party in whose favor a verdict is rendered shall prepare and deliver to the clerk the proper judgment to be entered thereon, and the clerk is required to tax the costs on the application of such party and insert them in the judgment, upon three days' notice to the other party. If the prevailing party fails thus to perfect his judgment within sixty days after the verdict, or, in case of a stay, within thirty days after the stay expires, he loses his right to costs, and the clerk must enter the proper judgment without costs. The mere pendency of a motion for a new trial does not operate as a stay of proceedings. *Ibid.*

PROMISSORY NOTE. See NEGOTIABLE INSTRUMENTS, 1. PARTIES, 1.

QUO WARRANTO. See OSHKOSH, CITY OF.

RAILROADS.

See EMINENT DOMAIN. MASTER AND SERVANT, 8. NEGLIGENCE, 4–6. TAXATION, 4.

1. In an action against a railroad company for the killing of a boy nine years old who had attempted to cross defendant's tracks at a point much used by pedestrians, it appeared that there were three tracks at the place of the accident with a space of about nine feet between them; that the boy was seen standing between the rails of the easterly track waiting for the passing of a freight train going south on the middle track; that immediately after the caboose had passed he started to run west across the other tracks and was struck and killed by the engine of a passenger train going

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north on the west track at a speed of about ten miles per hour. The engineer testified that he was keeping lookout ahead of his train but did not see the boy. *Held*, that the failure to see the boy was not inconsistent with the fact of a proper lookout. *Wickham v. C. & N. W. R. Co.* 23

2. The rate of speed of trains in a city being limited by ch. 467, Laws of 1891, to fifteen miles per hour, a less rate of speed cannot become unlawful unless by reason of some peculiar danger of the situation. *Ibid.*

3. The primary purpose of fencing the right of way of a railroad, as required by sec. 1810, R. S., is to prevent animals, not persons, from coming upon the track; but if it were otherwise, the company would not be liable, by reason of the failure to fence, for the killing of a person by a passing locomotive, unless it appeared affirmatively that such person came upon the right of way at a point where it was not fenced. *Ibid.*

[4. Whether it is the duty of a railroad company to fence its right of way within the limits of a city, where danger from domestic animals upon the track would be comparatively small and the fencing of the road might inconvenience public traffic, not determined.] *Ibid.*

5. A freight handler, while actually engaged in moving a freight car along the track to the freight house in the course of his employment, was engaged in operating and moving the car within the meaning of ch. 220, Laws of 1893 (making railroad companies liable for injuries to employees, without contributory negligence, received while engaged in operating and moving trains, engines, and cars, through the negligence of any other employee of the company). *Ean v. C., M. & St. P. R. Co.* 69

6. Under sec. 4255, R. S. (providing that "whenever the death of a person shall be caused by a wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured"), an action may be maintained by the administrator of a deceased railroad employee who was killed while operating cars, etc., through the negligence of another employee or agent of the company, under such circumstances that the deceased if he had lived could have maintained an action for his injuries under ch. 220, Laws of 1893. *Ibid.*

7. In an action for the killing of a railroad employee while engaged in moving a freight car on a side track by being run over by other cars which had been standing on that track, but which were in some manner put in motion, a complaint alleging the negligent failure of the defendant's employees to give warning of the approach of an engine and cars from some point beyond a curve so located as to interfere with the view from the point where the deceased was at work, but failing to allege that there was a curve, or that any cars came from beyond the curve and struck the standing cars, or that other cars were in fact moved upon that track, or that the standing cars were moved by other cars being negligently propelled against them and thereby pushed down upon and over the deceased, is *held* insufficient, even upon demurrer *ore tenus*, to show that the deceased came to his death by reason of cars being negligently propelled against the standing cars. *Ibid.*

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8. It is the absolute duty of a railroad company as a carrier of live stock to furnish cars which are suitable therefor, on reasonable notice from a shipper. If a car is furnished which is unsuitable, having defects which are not obvious nor such as an ordinary person would be likely to discover by inspection, yet which would be discovered by a reasonably careful inspection by an experienced person, the carrier will not be relieved from liability for an injury to an animal shipped in such car, arising from its defects and the failure of the carrier to exercise ordinary care in respect to its suitableness, by the fact that the shipper examined and accepted such car, unless he did so with full knowledge of its defects; nor will an agreement by the shipper to assume the risk of such an animal injuring itself during the shipment, caused by a want of ordinary care on the part of the carrier, and also all risk of insecurity in the floor of the car, relieve the carrier, such a contract being void. *Leonard v. Whitcomb*, 646

RECEIPT.

1. A receipt "in full of all demands to date," given to the owner of a farm by one who had worked on such farm under an agreement that he should be paid by a legacy in the will of the owner, but who had for six years ceased to work on the farm, covers such contract and shows a settlement of all claim for compensation for work under it. Such receipt contains in itself the elements of a contract, and therefore cannot be varied, explained, or contradicted by parol evidence. *Conant v. Estate of Kimball*, 550

2. Such a receipt may be avoided by clear proof of fraud or mistake, but it is not sufficient ground for avoiding it that the person who signed it did not fully understand its legal effect, where no fraud is shown. *Ibid.*

RECEIVER.

1. A receiver, appointed in an action to have a bank declared insolvent, cannot resist payment of a tax assessed against such bank, which is based on a property statement made by its cashier to the assessor in good faith before its insolvency, because the bank is estopped by such statement, even though it had in fact no property liable to taxation,— the property listed being its own bank stock which ought to have been assessed to the stockholders,— and the receiver is also estopped thereby. He, therefore, should be credited on his accounting with the amount paid on such tax, even though he made it without authority previously obtained. *Hamacker v. Commercial Bank*, 359

2. A receiver, on whose bond a surety company has become surety, as authorized by ch. 196, Laws of 1893, is entitled to be credited with the amount paid by him to such company for that service, provided the sum be reasonable as limited by ch. 219, Laws of 1895. *Ibid.*

REPLEVIN.

See APPEAL, 1-3.

[1. Whether an action of replevin can be maintained without returning notes given for the goods replevied, not determined.] *Louis F. Fromer & Co. v. Stanley*, 56

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2. To permit a plaintiff in replevin to waive and withdraw his claim for damages for the detention of the property replevied, after the case has been submitted to the jury, does not effect any substantial right of the defendant, and is not reversible error. *Williams v. Hoehle,* 510

3. A verdict for the plaintiff in replevin for a piano, claimed by her as an antenuptial gift from her husband, is *held* to be sustained by evidence that some two weeks before their marriage, she being at his office, he told her that he had bought her a present and asked her to guess what it was, and just then a man came with the piano and placed it in the room, and from that time they had both treated it as hers. *Ibid.*

RES ADJUDICATA.

See CRIMINAL LAW, 3. GUARDIAN, 1. NOTICE OF LIS PENDENS, 1.

A judgment in favor of plaintiffs in an action upon notes which they had previously transferred to a bank is not conclusive that they owned the cause of action at the time of the recovery or that it was due at the commencement of the action, as against other creditors of the maker who were not parties nor privies to the action, and does not bar them from asserting their rights to precedence. *Landauer v. Espenhain,* 169

RULES OF COURT.
Circuit Court Rule IX (as to guardian *ad litem*), 338.

SALE. See CONTRACT, 5. WAREHOUSE RECEIPTS.

SCHOOLS. See STATE BOARD OF HEALTH, 1–3.

SETTLEMENT.

A settlement between a public corporation, such as a town, and its treasurer respecting the public moneys which came to his hands, although made by the supervisors and ratified by the electors, is not conclusive upon the town, but if such officer, by mistake or otherwise, wrongfully retains public money in his hands, he may be proceeded against therefor at any time on discovery of the facts within the statutory period of limitation. *Town of Cady v. Bailey,* 370

SHERIFF.

Our statutes relating to the compensation of sheriffs for the maintenance of persons confined in jail (secs. 4947, 4950, R. S.), clearly contemplate that a sheriff shall keep accurate accounts of all charges and expenses therefor and present them to the county board to be audited, and if he fails to do so he can recover from the county only such expenses as he is able to show that he actually incurred, by clear and satisfactory evidence, and only such as are reasonable. *Deissner v. Waukesha Co.* 588

SPECIFIC PERFORMANCE.

1. The fact that a parol contract for the sale of land, to be paid for out of the proceeds of the timber, does not specify any time for the payment of the purchase money, does not render it so uncer-

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tain as not to be enforceable in equity, but the money is payable on demand. *Bartz v. Paff*, 96

2. Where several parcels of land are included in one parol contract of sale, part payment of the purchase money and a delivery of possession of one of those parcels, is sufficient to enable the purchaser to enforce specific performance of the contract as to all the parcels. *Ibid.*

STATE. See CONSTITUTIONAL LAW, 3, 4. TAXATION, 6.

STATE BOARD OF HEALTH.

1. There is no statute in this state authorizing compulsory vaccination, nor any statute which requires vaccination as one of the conditions of the right or privilege of attending the public schools; and, in the absence of any such statute, a rule adopted by the state board of health January 26, 1894, and modified in June, 1894, excluding from public and other schools all school children who do not present certificates of vaccination, cannot be sustained as a valid exercise of the police powers of that board. *State ex rel. Adams v. Burdge*, 390

2. The state board of health is a purely administrative body, and has no legislative power, and none can constitutionally be delegated to it. The provisions of secs. 1409*b*, 1409*d*, S. & B. Ann. Stats., authorizing that board to make such regulations "as may in its judgment be necessary for the protection of the people" from contagious diseases, and giving them the power to designate what diseases are "contagious or dangerous to the public health," are an unwarranted delegation of legislative power. *Ibid.*

3. Even if the state board of health possessed power to make such a rule excluding children from schools who do not present certificates of vaccination, it would be held to be void, because unreasonable, if at the time of its adoption there was no epidemic of smallpox existing in the state and but few cases scattered through the whole state, and if in the city where it was sought to be enforced there had been but one case and that had been properly quarantined, and the board of education had no belief or apprehension that it either is prevalent there or approaching the place. *Ibid.*

STATUTES.

Prior to the constitutional amendment of November, 1892, prohibiting the amendment of city charters by special acts, the charter of the city of Superior fixed the license fee for the sale of intoxicating liquors therein at "not less than $500, any general law of the state to the contrary notwithstanding," and that provision of the charter has not been changed by any subsequent legislation but still governs the fee for such license in that city. Although sec. 1548, R. S., as amended by ch. 296, Laws of 1885, fixes the license fee generally at $200, yet sec. 6 of said amendatory act provides that it shall not be construed to diminish the sum to be paid for a license in any city or village, as provided by its charter and ordinances, and the effect of ch. 286, Laws of 1893, amending and re-enacting such amended section, is to continue the same in force without any change except as to the time of the commencement and ending of the license year. *State ex rel. Farrell v. Howe*, 530

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STOCKHOLDERS. See CORPORATIONS, 4.

STREET RAILWAYS.

See EMINENT DOMAIN. TAXATION, 1.

1. A franchise to operate a street railway is inalienable at common law, but authority to sell and transfer it may be conferred by statute. In this state such authority is given by subd. 7, sec. 1748, R. S., and by ch. 221, Laws of 1883, as amended by ch. 127, Laws of 1891. *Wright v. Milwaukee Electric R. & L. Co.* 29

2. A franchise to operate a street railway is not merely an easement to use the street for the time, in the manner, and under the conditions specified in the grant, and, when accepted and acted upon by the grantee, a contract between it and the public, but it is also a grant from the state, by the acceptance of which the grantee becomes charged with the duty of serving the public, from which it cannot emancipate itself by merely ceasing to operate its cars. *Ibid.*

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3. A street railway was not operated on two blocks during four years and eight months, a period of great industrial depression, and of extraordinary financial difficulties on the part of its successive owners. During that time, the track had been taken up with the knowledge and acquiescence of the owner and the street paved, but the means of locomotion had also been changed, rendering the old track practically worthless and an entire reconstruction necessary. An ordinance declaring the franchises over such blocks forfeited was introduced, but upon the representation of the then owner that it was its intention to operate the road over such blocks in the near future, was not adopted. Any intention to abandon its rights in the street was expressly denied by the officials of the road. *Held*, that the nonuser of the franchises had not existed for such a length of time or under such circumstances that surrender of the franchises and its acceptance by the state could be presumed. *Combes v. Keyes*, 89 Wis. 297, distinguished and limited. *Ibid.*

SUPERVISORS. See EXCISE. MANDAMUS, 1–3.

SURVIVAL OF ACTIONS. See ASSIGNMENT. RAILROADS, 6.

SURETY.

See CONTRACTS, 6. MARRIED WOMEN, 2. RECEIVERS, 2.

A surety may, by action in equity, compel his principal to exonerate him by discharging the debt for which both are liable, without first paying it himself. *Dobie v. Fidelity & Casualty Co.*, 540

TAXATION.

See CONSTITUTIONAL LAW, 1–3. MILWAUKEE, CITY OF. PLEADING, 10. RECEIVER, 1.

1. Ch. 363, Laws of 1895 — requiring street-railway companies to pay license fees based on their gross receipts, and providing, in sec. 6, that the payment of such fees "shall be in lieu of all other taxes, assessments and licenses of any such corporation, and all personal property, franchises and real estate owned by such company or corporation shall be exempt from assessment and taxation; except that all land or lots unimproved, or having buildings thereon, owned by such person, company or corporation, shall be liable to taxation for state, county and school purposes," — clearly exempts from taxation all property owned by such companies, and not merely such as is used for railway purposes. *Milwaukee Electric R. & L. Co. v. City of Milwaukee*, 42

2. Sec. 3, art. XI. Const. (providing that "it shall be the duty of the legislature, and they are hereby empowered, to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent abuses in assessments and taxation, and in contracting debts by such municipal corporations"), does not prevent the legislature from exempting the property of street-railway companies from special assessments for local improvements. *Ibid.*

3. The objection that a town tax was void because the resolution authorizing it failed to specify the specific purposes for which it was to be expended is not available in an action in equity to set aside the tax and enjoin its collection. *Chicago & N. W. R. Co. v. Forest County*, 80

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4. Property of a railroad company, such as coal and tools for use in repairing the tracks, necessarily used in operating the road, is not liable to seizure and sale on execution to satisfy a tax, and an injunction may properly be issued to prevent such seizure and sale. *Hill v. L. C. & M. R. Co.* 11 Wis. 223, and *Chicago & N. W. R. Co. v. Ft. Howard*, 21 Wis. 44, overruled. *Ibid.*

5. Land of which the legal title remains in the vendors, but the actual possession is in the city of Milwaukee under contracts which give it the option to become the owner on making certain payments, with the right to possession until default, but create no legal obligation on the part of the city to purchase or make the payments, cannot be considered as either owned exclusively or held under a lease by the city, and is not therefore exempt from taxation under either subd. 2, sec. 1038, R. S. 1878, or sec. 11, subch. XX, of the city charter (ch. 184, Laws of 1874). *City of Milwaukee v. Milwaukee County*, 424

6. There is nothing in the provision of ch. 74, Laws of 1889, that the title acquired by the state under deeds taken pursuant to the act of 1885, to lands conveyed by it to private persons prior to taking such new deeds, shall inure to the benefit of such persons, to change the relation of the state to such lands, or its obligation to maintain the title. *Lombard v. McMillan*, 627

TIME. See CONTRACT, 4. NEGOTIABLE INSTRUMENTS, 1.

TOWN.

See EXCISE. HIGHWAY, 1, 2, 3. PLEADING, 6. SETTLEMENT.

Though sec. 776, R. S., gives to electors of towns power to direct the institution of actions for such towns, yet sec. 819, R. S., is mandatory in requiring town supervisors to prosecute all breaches of official bonds, and a vote of the electors is not necessary to authorize such an action. *Town of Cady v. Bailey*, 370

TRESPASS.

An intrusion by one lot-owner of his foundation wall upon the land of the adjoining owner, without permission, is a trespass, and may be treated as a disseisin; but if the owner of the land so intruded upon extends his own building to his line and rests it upon such wall and occupies the same continuously, he thereby elects to treat the intrusion as a mere trespass, and cannot maintain ejectment therefor. *Zander v. V. Blatz Brewing Co.* 162

TRUST.

See DEED, 3. GUARDIAN. PARTIES, 3. VENDOR AND PURCHASER, 2, 3.

Neither a mortgagor who has given a mortgage to hinder and delay his creditors nor such creditors can maintain an action to enforce a trust in favor of the creditors growing out of such a transaction, because a trust in land can, under sec. 2302, R. S., be created or proved only by an instrument in writing. *Krouskop v. Krouskop*, 296

UNDUE INFLUENCE. See WILLS, 5.

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VENDOR AND PURCHASER.

See NOTICE OF LIS PENDENS. TAXATION, 5.

1. A purchaser of land under a parol contract, who has paid part of the purchase money, has an equitable title to the land, though the legal title remains in his vendor; and a judgment duly docketed against the purchaser attaches as a lien upon his equitable title, and is good as against all persons except purchasers in good faith, without notice of the lien. CASSODAY, C. J., dissenting, holds that actual knowledge of the rendition of the judgment should be held no less potential in equity than actual knowledge of the docketing. *Bartz v. Paff*, 95
2. The vendor, in such a case, holds the title, to the extent of the purchase money paid, as trustee for those beneficially interested therein; first for any creditor of the purchaser who has obtained a judgment lien thereon, and then for such purchaser. *Ibid.*
3. If such vendor, by direction of the purchaser, sells and conveys a part of the land to a third party who buys in good faith and without notice of the judgment lien, the title will pass to him free from the lien, and the trust will attach to the purchase money in the hands of the vendor, and he will be liable to account therefor as trustee, if he pays it over to the original purchaser, unless he does so without knowledge of the existence of such judgment lien. CASSODAY, C. J., dissenting, holds that the amount received by the vendor on such sale should be applied as payment on the purchase money due him from the original purchaser, thus increasing the lien upon the remainder of the land. *Ibid.*

WAIVER.

See BENEFIT SOCIETY, 3. MASTER AND SERVANT, 9. PLEADING, 9, 11. REPLEVIN, 2.

1. A general appearance by a defendant and a motion by him to set aside a judgment by default constitute a waiver of defects in the service of the summons. *Pfister v. Smith*, 51
2. A mutual insurance company cannot be held to have waived the defense pleaded by it to an action on its policy, that the plaintiff therein set the fire which consumed its property, by the mere inadvertent act of its secretary in sending a notice of a general assessment to such plaintiff while the action was pending. *Agnew v. Farmers' M. P. F. Ins. Co.* 445

WAREHOUSE RECEIPTS.

See PLEDGE, 2.

In order to render storage warrants "warehouse receipts" so that title to and constructive possession of the property covered thereby would pass by their transfer and indorsement, they must have been issued by a warehouseman or one openly engaged in the business of storing property for others for a compensation; and the mere fact that a corporation engaged in smelting ore issued such war-

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rants on iron in its yard did not constitute it a warehousing corporation. *Geilfuss v. Corrigan*, 651

WARRANTY. See BENEFIT SOCIETY, 3, 4. CONTRACT, 5.

WILL.

See APPEAL, 9, 17.

1. On appeal to the circuit court from a decision of the county court refusing to admit to probate a will alleged to have been lost, the proponent produced evidence establishing the facts that the testatrix made a valid will, the contents of which were clearly proved, and left it with the notary who drew it; and that after her death it could not be found. The notary could not testify positively as to what had become of it, but thought the testatrix had taken and retained it. *Held*, that the presumption of revocation arising from her alleged possession of it and its disappearance was rebutted by evidence of frequent declarations by the testatrix, up to within three days of her death, that it was still in existence, unchanged, and in the possession of such notary, and that the will was properly admitted to probate. *In re Steinke's Will*, 121

2. Where two wills made by a testator, the second providing in substance that it should take effect only in case certain bequests in the first were declared void, were admitted to probate together as a will and codicil, *held* that, in the absence of any appeal therefrom, the probate was conclusive upon all parties as to the due execution of both, and that together they constituted the last will and testament of the testator, and that the first was not revoked by the second. *Dicke v. Wagner*, 260

3. A first will provided, "This bequeath above made by me to my said wife I. W. shall not interfere with her right of dower, or be considered as part or parcel of payment of her right of dower or thirds. In case of my death she shall be entitled to all of her dower, thirds, or interest as my widow, in and to all my other property, the same as if the above bequeath had never been made;" and a second will, probated as a codicil, provided: "This bequeath shall not be considered as part payment of her dower interest or thirds in my estate. She shall be entitled, besides the above bequeath, to all under the law in such case made and provided, as my widow, if she shall survive me." *Held*, that these expressions constituted a devise to I. W. of such interest in the testator's land and homestead as she would have been entitled to by statute had she been his lawful wife. *Ibid.*

4. Evidence that during the last three or four years of the testator's life his manner of living and of doing business and his habits in some other respects had materially changed, and he had associated with immoral women, sustains a verdict that he had not mental capacity to make a valid will. *Bryant v. Pierce*, 331

5. An impaired and enfeebled condition of mind renders a person more susceptible to undue influence, and where a will is contested on that ground, the prior and subsequent declarations of the testator are admissible in evidence to prove or disprove his capacity to discover and resist importunities, flatteries, or other acts tending to unduly influence him. The previous relations, friendships, and intercourse between the testator and the several parties con-

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cerned, and the physical and mental condition of the testator, may be shown, as well as the circumstances under which the will was executed. *Ibid.*

WORDS AND PHRASES.
Compelled to disclose, 320.
Disorderly house, 497.
Murder. Manslaughter, 288.
Shift boss. Co-employee, 311.
Sound health. Serious disease, 318.
Stockholder, 151.
Suitable person, 416.

WRIT OF ERROR.

1. The provision of ch. 215, Laws of 1895, prohibiting appeals to the supreme court from judgments in which the amount involved, exclusive of costs, is less than $100, unless the judge of the trial court shall certify that certain material questions, therein specified, are involved, does not apply to writs of error. *Bumbalek v. Peehl,* 127

2. The occasion for a motion to modify a judgment having been removed by the reversal of the judgment, a writ of error to review the order denying it will be dismissed. *Markwell v. Pereles,* 424

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